No. 514

IN THE

Supreme Court of the United States

October Term, 1944.

THOMAS HENRY ROBINSON, JR., - Petitioner,

versus

UNITED STATES OF AMERICA, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas Henry Robinson, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals, Sixth Circuit, affirming the judgment of conviction and the death sentence imposed upon petitioner in a criminal cause in the United States District Court for the Western District of Kentucky. The judgment of the United States Circuit Court of Appeals, Sixth Circuit, affirming the judgment of said District Court, was entered on July 31, 1944 (R. 1569). On July 17, 1944, petitioner filed petition for rehearing, which was denied on August 28, 1944. Issuance

of the mandate of the United States Circuit Court of Appeals, Sixth Circuit, was stayed on September 11, 1944, by that Court pending application to the Supreme Court of the United States for writ of certiorari and until further disposition of the case in that Court (R. 1575).

JURISDICTION.

The jurisdiction of this Court is as provided for in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C. 347; Title 28, U. S. C. A. 347).

STATUTES INVOLVED.

The statutes directly involved are the Act of June 22, 1932, c. 271, Section 1; 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 781 (Title 18, Section 408a, U. S. C. A.), and read as follows:

> "Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: Provided, That the failure to release such person within seven days after he shall

have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive."

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner has been sentenced to die in the electric chair.

On December 11, 1943, the petitioner, Thomas Henry Robinson, Jr., was found guilty of the offense of transporting Mrs. Alice Stoll, while kidnaped and held for ransom, from Louisville, Kentucky, to Indianapolis, Indiana, and of not liberating her unharmed, and the jury recommended punishment by death (R. 66 and 1519). On December 13, 1943, the petitioner was sentenced by the Court to die in the electric chair at the Eddyville, Kentucky, Penitentiary (66-67).

On October 20, 1934, the Grand Jury of the United States of America, for the Western District of Kentucky, returned an indictment (R. -14), in which the petitioner, his father, and petitioner's wife were charged in the first count of having violated Title 18, U. S. C. A., Section 408c, by conspiring to violate Title 18, U. S. C. A., Section 408a. In the second count of the indictment the three of them were charged with having, on October 10, 1934, unlawfully transported in interstate commerce Mrs. Alice Stoll, while kidnaped and held for ransom, and of having failed to release her unharmed, in violation of Title 18, U. S. C. A., Section 408a.

The petitioner's then wife, Mrs. Frances Robinson, and his father were tried together in October, 1935, in the United States District Court at Louisville, Kentucky, and were acquitted by the jury on both counts. The first count,

a conspiracy count, as to petitioner, was *nolle prossed*. Petitioner was prosecuted under Count Two of the indictment.

On May 11, 1936, petitioner was apprehended in Glendale, California, by agents of the Federal Bureau of Investigation. He was not arraigned in California before any United States Commissioner, Judge, or magistrate, nor did any judge in California issue, nor any United States Marshal execute, a warrant for his removal from California to Kentucky. The record does not disclose any evidence of a waiver of removal. On the night of his arrest, petitioner was rushed to the airport and transported by plane from Glendale to Louisville, arriving in Louisville on the morning of May 12, 1936, in the custody of F. B. I. agents (R. 933).

He was then taken immediately to the Starks Building Office of the F. B. I. and there held incommunicado. While held there he was questioned constantly, and the agents threatened him with the death penalty and told him to plead guilty (R. 934-935). In the late afternoon of May 13, 1936, he was taken, shackled and handcuffed to an F. B. I. agent (R. 935)[1], before the judge of the United States District Court, at Louisville, for arraignment (R. 933).[2]

He had no counsel and was not allowed to procure any (R. 934).[3] His mother was hysterical and his father was intoxicated (R. 934).[4]

He was not allowed to sleep from the time of his arrest in California on May 11th until after he was imprisoned in Atlanta Penitentiary on May 14th (R. 935).[5]

On two occasions previous to the arraignment on May 13, 1936, petitioner had been adjudicated insane by courts of record in his home State of Tennessee, and on each of

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1-5See Robinson v. Johnston 50 F. Supp. 774.

those two occasions he was committed to insane institutions of that State, the first time on June 27, 1929, and the second time on May 7, 1930 (R. 893-903).[6]

At the time of arraignment, the trial Judge, United States Attorney, Assistant United States Attorney, and F. B. I. agents all had knowledge of the facts relating to the adjudication of petitioner's insanity (50 F. Supp. 774).[7]

Under these circumstances, petitioner was arraigned on May 13, 1936, whereupon he uttered but one word, "Guilty" (R. 935).[8]

He was then sentenced to life imprisonment, and immediately thereafter was taken to the Atlanta Penitentiary. From there he was removed to the Leavenworth Penitentiary, where he was held for ten months (R. 936).[9]

While at Leavenworth Penitentiary he was induced by Warden Zerbst to write a letter, dated July 1, 1936, to a Mr. Bates, then Director of the Bureau of Prisons. Petitioner wrote the letter, and therein disavowed present and prior insanity, upon the promise and inducement made to him, by the said warden, that if he would disclaim present and prior insanity he would be eligible for parole, be taken out of isolation, and be allowed the regular run of the penitentiary (R. 955-960). There was no refutation by the Government or any of its witnesses that petitioner thus acted upon the inducements, hopes and promises held out to him.

From Leavenworth he was transferred to the Alcatraz Island Penitentiary.[10] His conduct at those institutions was exemplary (R. 936).

In 1939, petitioner filed an application for a writ of *habeas corpus* in the United States District Court at San Francisco (R. 936).[11] The writ was denied and an appeal

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[6-11] See Robinson v. Johnston, 50 F. Supp. 774.

was taken (Robinson v. Johnston, 118 F. 2d 998), and the judgment of the lower court was affirmed, one judge dissenting.

The Supreme Court of the United States granted certiorari and reversed and remanded the case to the United States Circuit Court of Appeals for the Ninth Circuit, with leave to petitioner to apply for a hearing *en banc* (U. S., *ex rel.* Robinson v. Johnston, 316 U. S. 649, 62 S. Ct. 1301, 86 L. Ed. 1196). The Circuit Court of Appeals for the Ninth Circuit heard the case *en banc* and reversed and remanded the case to the District Court with instructions to issue the writ of *habeas corpus* and to proceed to a hearing and determination of the merits (Robinson v. Johnston, 130 F. 2d 202). Judge Michael J. Roche, of the United States District Court at San Francisco, granted and sustained a writ of *habeas corpus*, holding that petitioner had been denied his constitutional rights of assistance of counsel and of due process of law (50 F. Supp. 774). In his opinion releasing petitioner, Judge Roche further ordered that petitioner be returned to the Kentucky trial court for further proceedings (50 F. Supp. 775).

Judge Roche did not issue, nor did any Judge, Commissioner, or Magistrate issue, nor did the Marshal of that district execute, a warrant for petitioner's removal to the Western District of Kentucky, as is required by Section 591 of Title 18, United States Code Annotated (R. 116).

Petitioner was returned to Louisville by the California Marshal on September 28, 1943 (R. 172), and delivered to the Kentucky Marshal. On the same date he was brought into the United States District Court at Louisville, and counsel was appointed for him by the Court (R. 6), following which, and at subsequent proceedings, various motions,

a demurrer to the indictment, and other pleadings were filed and ruled upon.

On October 13, 1943, petitioner was arraigned and entered a plea of not guilty (R. 216), and the case was set for trial on November 29, 1943. The trial began on that date. Petitioner exhausted all of his peremptory challenges and used five of those in striking five jurors whom he had unsuccessfully challenged for cause.

On the night of December 11, 1943, the jury returned a verdict of guilty and recommended punishment by death (R. 59, and 1519). Sentence was deferred by the Court until December 13, 1943, on which date counsel for petitioner filed a motion in arrest of judgment (R. 60, 61), and a motion and grounds for a new trial (R. 61), both of which were summarily overruled by the Court (R. 88). The Court followed the recommendation of the jury and sentenced petitioner to die in the electric chair March 10, 1944, at the State Penitentiary at Eddyville, Kentucky (R. 67).

Petitioner filed notice of appeal (R. 90), obtained an order staying and suspending execution of sentence pending appeal (R. 103), and otherwise perfected his appeal to the United States Circuit Court of Appeals for the Sixth Circuit by taking the required steps, including the filing of an Assignment of Errors (R. 115-170), the filing and settling of a Bill of Exceptions (R. 171-1556).

On July 31, 1944, the United States Circuit Court of Appeals, Sixth Circuit, rendered its opinion and affirmed the judgment appealed from (R. 1569).

On August 17, 1944, petitioner filed a petition for rehearing in the United States Circuit Court of Appeals, for the Sixth Circuit (R. 1573), and it was denied on August 28, 1944 (R. 1574). On September 11, 1944, that Court entered an order withholding the issuance of the mandate

and staying sentence pending proceedings in the Supreme Court of the United States (R. 1575).

The following statement of the material parts of the evidence is presented as briefly and as concisely as possible.

Petitioner was born, reared and educated in Nashville, Tennessee. His mother, who still lives, is Mrs. Jessie P. Robinson. His father, now deceased, was Thomas Henry Robinson, Sr., a civil engineer and former manager of the Nashville Bridge Company (R. 891). Petitioner received grade school training and preparatory schooling at Nashville; attended Vanderbilt University and studied law there as a special student for two and one-half years, but did not complete the course (R. 880, 881) for reasons that will appear forthwith.

When about 11 years of age, petitioner was kicked very severely on his right cheek by a horse, which impaired the bony structure of his cheek bone (R. 884). During childhood he had the normal run of children's diseases. At the age of 14 he had malaria in such an aggravated form that it almost cost him his life. Following the malarial disease he had pneumonia and pleurisy when he was between 14 and 15 years of age, and following this he developed tuberculosis in both lungs, for which he was treated at the Davidson County, Tennessee, Tuberculosis Sanitarium, where he was a patient for one year (R. 882, 883).

Petitioner regularly attended the Presbyterian Church, where his father for a period was a deacon and Bible class teacher. He was a member of the Boy Scouts, nearly attaining the rank of Eagle Scout, and his father was Scout Master of the troop (R. 891).

While attending Vanderbilt University he belonged to two fraternities; traveled in good society; was a close friend of James Melton, nationally known star of the

opera, radio and screen; got along well in his studies; had a host of friends, and took an active part in school activities. During his first year in Vanderbilt Law School he was forced to marry a young woman of questionable character, in typical "shotgun" marriage style. Two deputies, the girl, her uncle and her mother came to petitioner's fraternity house and he was served with a warrant which charged him with violation of the age of consent law.

He married her under force and duress, but did not live with her. He had known her less than seven months previous to the forced marriage. Several days after the marriage a nine-months' child was born. This woman to whom he had been married then began to make demands on his parents for considerable money, following which he, through his father, filed an annulment or divorce suit against her, and he was divorced from her (R. 885-888). That affair caused him to be socially ostracized, as it was considered quite a scandal at the time (R. 889).

These misfortunes had a marked effect upon his mental state. The humiliation and scandal disturbed him considerably, thwarted his plans for a legal and business career, and severed his social contacts; was the cause of much embarrassment to him in law school, all of which caused him to brood greatly; changed his plans, his outlook; changed his personality from one gay, pleasant, and personable, to one broody and morose. He avoided his old friends; remained alone most of the time; began to live a secretive life; started dropping his studies, and eventually he quit the law school. He then obtained employment with the Wayne Lumber Company, in Nashville, as cost accountant and timekeeper for a period of about five months, but was discharged for neglect of duty, superinduced by heavy drinking brought about by the forced marriage (R. 889, 890).

After being discharged by the lumber company, he married for the second time on January 9, 1929, and of that marriage there was born a son, James Preston Robinson, now 14 years of age (R. 893).

On June 27, 1929, petitioner was adjudicated insane, the first time, in the Circuit Court of Davidson County, Tennessee, after a jury, which had been impaneled to try the issue of his sanity, returned a verdict declaring him to be "insane and too dangerous to society to be set at large" (R. 897, Defendant's Exhibit No. 14). It was the unanimous diagnosis of the Staff of the Central State Hospital, at Nashville, that he was suffering from the schizophrenic type of dementia praecox. He was then committed to that hospital, where he stayed confined for about one year (R. 895-898).

On May 7, 1930, a jury impaneled by the Davidson County Court to inquire into his sanity rendered a verdict that he was of unsound mind and did not have capacity sufficient for the government of himself or his property (R. 897, 900, Defendant's Exhibit No. 15), after which he was committed to the Western State Hospital for the Insane, at Bolivar, Tennessee, where he remained three months (R. 896-900). His father was appointed his legal guardian (R. 901).

On August 24, 1930, he was taken out of Western State Hospital at the instance of his father, over the strenuous objections of the Superintendent, Dr. E. W. Cocke (R. 902).

Following his removal from Western State Hospital, petitioner was not, and has never been, restored to sanity by any proceeding in any court (R. 901, 902) until found sane just before trial in 1943 by four psychiatrists appointed by the court (R. 1388-1389).

After petitioner's removal from Western State Hospital, he returned to his parents' home in Nashville and made several attempts to obtain employment, but was unable

to do so until nearly a year later (R. 903). He finally obtained employment with Servel, Incorporated, at Evansville, Indiana, but quit after one day and went home (R. 903).

He found it more difficult to get employment because the stigma of insanity was worse than the disgrace of the forced marriage. Most of his old friends, particularly the girls, shunned him, and he stayed mostly to himself. He felt that his friends were talking about him; every time he saw a group of them he felt that they were talking about the insanity adjudications and his forced marriage. He had quit going to church because he felt that the ministers were preaching directly at him (R. 904).

While in the insane institutions he felt that the doctors were against him and he tried to convince them he was sane; he felt that the doctors were persecuting him and that they had no right to hold him (R. 95; 1094-1121).

He had many ideas of grandeur—believed that he could cope with national problems, such as religion, politics, and national events (R. 906). He is, in reality, a descendant of Patrick Henry, deriving his middle name from that relationship. He felt that he was the reincarnation of Patrick Henry and that he should have some high place in national affairs; that he had been ordained to carry out Patrick Henry's work. He spent a great deal of time arguing with his family that that was true, and when his family would not agree with his theories, he would become very angry and go to his room and close himself in (R. 907, 908). At one time he threatened to shoot his father (R. 1074), and on one occasion tore his wife's dress to pieces (R. 1075). His whole personality would undergo a complete change—his eyes would take on a crazy stare and he would fly into tantrums (R. 1074).

In June, 1931, his father procured employment for him with the Stoll Oil Refining Company in Louisville. His

father formerly had been associated with Mr. C. C. Stoll in a business venture. He was given a job as filling station attendant, which duties included the care of a parking lot in the rear of the station. He worked for that company for about six weeks (R. 909).

During the period of his employment at that station, Mrs. Alice Stoll drove her car into the station to have it parked on an average of several times a week and he would park it for her (R. 910; 752-754). During this time he claims that he became acquainted with her and had frequent conversations with her (R. 910). On her direct examination, Mrs. Stoll denied knowing him prior to October 10, 1934, the date of the alleged kidnaping (R. 534). Mr. H. C. Richardson, former manager of the Stoll station, who was summoned as a Government witness, admitted on cross-examination that it was very possible that Mrs. Stoll saw petitioner on the occasions, about twice a week, when she would park her car at that station (R. 752-754).

Petitioner testified that he met Mrs. Stoll several times during the period of his stay in Louisville in the year 1931, and that he had sexual relations with her, on one occasion at a secluded country spot, on one other occasion at a tourist camp on the outskirts of Jeffersonville, Indiana, and on two occasions at the Beech Grove Tourist Camp (R. 911-913). Mrs. Stoll was not called as a rebuttal witness to refute this testimony.

Testimony was introduced by the Government to establish that, at the time petitioner testified he went to the Beech Grove Tourist Camp with Mrs. Stoll, the place was known as the Beechwood Inn, and that no tourist cabins were in existence at that time (R. 1347-1364) Beechwood Inn changed its name to Beech Grove Tourist Camp in August, 1931 (R. 1352), while petitioner was still in Louisville, working then for the Mutual Life Insurance Com-

pany, where he was employed until September 12, 1931 (R. 913, 1496).

As a surrebuttal witness, petitioner called Mr. Ivan Carlisle, owner of the Beechwood Inn. Mr. Carlisle testified that he was the owner of the inn during the summer of 1931, before it changed hands and names; that during that summer he had rooms available for tourists, and which he rented to tourists (R. 1417, 1422, 1423) and that such accommodations existed when he leased it to Mr. Allen and when sold to a Mr. Palmer. Mr. Carlisle testified that the F. B. I. held him incommunicado in their office on Thursday and Friday preceding the day (Saturday) he testified; that he had made a statement to the F. B. I., and told them, in substance, what he testified about from the witness stand, but that he could not get away from them because they would not let him go, and that they went with him everywhere he went (R. 1423, 1424).

No rebuttal testimony was offered by the Government to refute petitioner's testimony to the effect that he had accompanied Mrs. Stoll to a tourist cottage on the outskirts of Jeffersonville, Indiana.

Petitioner left Louisville in the fall of 1931 and went home. Following a period of unemployment, he went to Winnetka, Illinois, where he worked as a salesman for an oil burner concern for two weeks. He returned to Nashville, remained unemployed for months, and in the summer of 1932 he became a salesman of night law courses for the Andrew Jackson Business College. He quit that work. Then he and an attorney representing the Spreckels Estate attempted to promote a business venture, but he soon severed that connection. From January 1, 1933, to April 1, 1933, he and his wife worked in an apartment hotel in South Bend, Indiana, he as maintenance man and his wife as housekeeper. He was discharged from that job. He then went to Chicago and tried to get employment from

April, 1933, until mid-summer of 1933, but was unsuccessful. He registered at employment agencies, answered ads. in the newspaper "help-wanted" columns, and typed literally hundreds of letters of application, but it was during the depression period and he met with no success. While connected with the business college, he had written a book on how to get a job (R. 913-917).

During the time he was trying to get employment some prospective employer either told him, or he imagined it, that Mr. Stoll was giving him bad references. He had given Mr. Stoll as a reference in his applications for employment, and he felt that he was being refused employment solely through Mr. Stoll giving him a bad name (R. 918).

In November, 1933, petitioner was employed as timekeeper for the DuPont Company, but was discharged in May, 1934, after his insanity record had come to the attention of John Ward, chief clerk (R. 920, 1312, 1314).

In May of 1934 he sought re-employment of Mr. C. C. Stoll, but Mr. Stoll told him that it was not the policy of the company to rehire employees who had once quit, and also mentioned the depression and said that the country was in the hands of a dictator, meaning President Roosevelt, and that he, Stoll, would not spend one dime to even buy paint for his filling stations. Those statements convinced petitioner that it had been because of Mr. Stoll that he had failed to get employment with other concerns; petitioner felt in his own mind that Stoll was a menace to the country and that something should be done about it. That idea became firmly entrenched in petitioner's mind (R. 919).

He did not have any revengeful thoughts toward Mr. Stoll; being actually a descendant of Patrick Henry, and believing that he was the reincarnation of that patriot, he felt impelled, through that inspiration and through a pa-

triotic duty, to do something about the person he considered a menace (R. 920).

Following this interview with Mr. Stoll, petitioner returned to Chicago and, through a friend, obtained a job as night janitor in a building in Oak Park, where he worked for a few weeks. That was the last job he had (R. 920, 921).

He stayed in Chicago for about two months. In September, 1934, he rented a car from the Saunders Drive-It-Yourself System in Chicago, drove himself and wife to Indianapolis, and rented an apartment there at 2735 North Meridian Street. He tried to get employment, but failed. He began to brood a great deal, and Mr. Stoll constantly entered his mind. He felt that Mr. Stoll had been the cause of most of his trouble; that Mr. Stoll was a menace to the country and was responsible for the depression, and he felt impelled, from a patriotic standpoint, to take some immediate action (R. 922).

While in the apartment in Indianapolis he prepared a ransom note with the idea of abducting Mr. C. C. Stoll. He then drove himself and wife to Louisville. His wife went home to Nashville and he stayed in Louisville at the Tyler Hotel (R. 922).

On October 9, 1934, with the purpose of carrying out his plan, he drove to Mr. C. C. Stoll's residence in Louisville and entered the home under the pretense of being a telephone repairman. He didn't find him at home, so he went over to the adjoining house of George Stoll, brother of C. C. Stoll, using the same pretense, but he did not find C. C. Stoll there, so he abandoned the idea for that day (R. 923).

On the next day, October 10, 1934, he planned to kidnap Berry Stoll, husband of Mrs. Alice Stoll, and son of C. C. Stoll. He knew Berry Stoll, having worked for his com-

pany, and petitioner held him equally blamable for the plight of the country and of petitioner (R. 923).

On October 10, 1934, at about 2:00 P. M., he drove to the home of Berry Stoll, gained admission to the house by again pretending to be a telephone repairman, and used that ruse to reach the second floor. He encountered Mrs. Alice Stoll in the guest room, and upon seeing him she inquired: "What are you doing here?" (R. 552, 924), and he replied that he had come to kidnap Berry. She remarked: "Well, you can't get away with that. You know Berry. You are just an amateur" (R. 924). He and Mrs. Stoll talked for about an hour. She offered him a check, which he refused (R. 554). She then suggested that she would go herself instead of him taking Berry, stating that she was anxious to get away before Berry came (R. 557). She got her coat from the closet, put it on, then she and the petitioner left the house and got in the car—she in the back end and he in the front (R. 924, 925).

Mrs. Stoll and the maid, Ann Woolet, claimed that petitioner bound Mrs. Stoll's wrists and taped her mouth (R. 522, 609), but that is disputed by petitioner. Mrs. Stoll herself testified that she was allowed to get and did get her coat before proceeding to the car (R. 522, 523). She did not explain how she was able to do this with her hands bound. Mrs. Stoll and the maid also testified that petitioner struck Mrs. Stoll twice with an iron pipe when she tried to procure a gun (R. 610-611), one of which blows allegedly caused blood to flow freely upon a bedspread (R. 610, 611). No blood-soaked bedspread or coat were produced at the trial. Mr. Edwin R. Donaldson, a Government expert, testified that the only blood submitted to him in this case for analysis was a small spot on an envelope and that he was unable to determine whether this minute spot of blood was human or animal (R. 832).

Petitioner vigorously denies that he struck her. The maid, Ann Woolet, signed and executed an affidavit in September, 1935, which contradicted and impeached her testimony, but the Court refused to permit petitioner to impeach her by showing this or by showing by witnesses William K. Powell (R. 1058-1069), Joseph M. Hayse (R. 1032, 1036, 1166-1185), and Nellie S. Hayse (R. 1185-1191) that she had made contradictory statements and had signed and executed the affidavit. The testimony of these witnesses was put in the record by avowal.

An iron pipe was produced (R. 654; Government Exhibit No. 34) wrapped in brown paper bearing an unexplained stain which to the jury may have resembled blood, but which was not blood nor claimed to be blood, said stain being in all probability iodine or silver nitrate which is commonly used in fingerprint work. Government experts did not testify to finding petitioner's prints on either pipe or paper. Neither Mrs. Stoll nor any other witness had placed any identifying mark on pipe or the paper in which it was wrapped. There was no evidence that petitioner wore gloves when in the Stoll home. Without having it positively identified, the United States Attorney filed it as an exhibit, displayed it before the jury, and at one point in the proceedings struck it with a hard blow against counsel table. Counsel for petitioner objected, and the District Attorney apologetically asserted it to have been an accident (R. ——).

When told to describe her physical condition at time of release, Mrs. Stoll was not asked, nor did she state, who had caused the conditions which she claimed were in existence at that time, and neither was she asked, nor did she state, whether those injuries were the same as, or the result of, the previously inflicted injuries which she claimed were

caused by petitioner six days earlier (R. 545). There were two other persons also charged in the indictment with this offense. It is the contention of petitioner, first, that Mrs. Stoll was not in a harmed condition at time of release, and, second, that there was no evidence that he caused the injuries which were claimed to be in existence at that time.

After leaving the Stoll house, petitioner and Mrs. Stoll drove from Louisville to Indianapolis, and went to the apartment which petitioner had previously rented. Mrs. Stoll assisted in the preparation of a meal, and both she and petitioner ate what had been prepared (R. 928). It is likewise made an issue that petitioner transported Mrs. Stoll from Louisville to Indianapolis while she was kidnaped or held for ransom.

Petitioner and Mrs. Stoll occupied the Indianapolis apartment for six days, during which time they ate meals prepared by her, drank beer, listened to the radio, read newspapers and discussed current events (R. 928). He maintains that for the first four days she was not restrained in the apartment, but that she was there willingly, and that he left her there, unrestrained, at such times as he found it necessary to go out (R. 928, 929). On the contrary, Mrs. Stoll claimed that she was bound to the bed at night, bound, gagged, and put in a closet on a chair on each occasion that petitioner left the apartment, and that he constantly threatened her with a gun, and that she was afraid to attempt to escape. On cross-examination she admitted that petitioner treated her like a gentleman (R. 564).

The apartment was on the ground floor. A window and toilet seat of the exact measurements of those in the apartment bathroom, and similarly arranged, were assembled in the courtroom and a Miss Marjorie Kirchhubel, a young

woman of Mrs. Stoll's build and weight, demonstrated that by stepping on the toilet seat, raising the bathroom window, and easing through, Mrs. Stoll could have liberated herself from the apartment (R. 1122). Mrs. Stoll testified that when she was in the bathroom, petitioner always stayed in the living room. Testimony and exhibits show that the bathroom window was not visible from the living room. Mrs. Stoll stated that she could have locked the bathroom door from the inside. She made no effort to raise the bathroom window and escape, or seek help, or slip a note out of the window. Witness Johnson, the apartment house custodian, testified that between the 10th and 16th of October, 1934, garbage was removed regularly from petitioner's apartment; milk was delivered, tradesmen came and went, and that the janitor's quarters were directly beneath the apartment and that he, 5 feet 11½ inches in height and weighing 169 pounds, could and had gone through that bathroom window (R. 712-720).

During the time petitioner and Mrs. Stoll were in the apartment, she wrote letters to members of her family and to intimate friends for the purpose of facilitating the payment and delivery of the money. She claimed that she was directed and compelled to write them (R. 533), but petitioner maintains that she wrote them voluntarily (R. 932).

The sum of $50,000.00 was procured and delivered to petitioner's father, who had agreed to act as intermediary at Mr. Stoll's request, and this sum was taken by petitioner's wife to the Indianapolis apartment at ten o'clock on the morning of October 16, 1934 (R. 972). Petitioner left the apartment for the last time that morning and his wife remained with Mrs. Stoll (R. 928).

Mrs. Stoll testified on direct examination that before petitioner made his final departure he bound and gagged

her; that Mrs. Robinson did not untie her or remove the gag until that afternoon when she was released (R. 545). Petitioner denies this. He testified that at the time of his final departure, Mrs. Stoll was drinking milk and eating some breakfast prepared by Mrs. Robinson (R. 938). On cross-examination Mrs. Stoll admitted that she and Mrs. Robinson stayed in the apartment until the afternoon of that same day, during which time they engaged in conversation about trivial matters; that Mrs. Robinson went out and got some sandwiches and beer and that the two of them ate them and that Mrs. Stoll drank two bottles of beer (R. 584). Mrs. Stoll did not explain how she was able to eat, drink, and talk while she was bound and gagged.

From the apartment Mrs. Robinson and Mrs. Stoll went to a drug store where Mrs. Robinson called a taxicab and the two of them went to the home of a Rev. Clegg, a relative of Mrs. Stoll (R. 585). At the Clegg home Mrs. Stoll called a Miss McHenry in Louisville to notify her that she was returning to Louisville (R. 586), after which Mrs. Stoll, Mrs. Robinson and the Rev. and Mrs. Clegg started to drive to Louisville in the Clegg automobile. They were overtaken by F. B. I. agents at Scottsburg, Indiana, who stopped the party and took Mrs. Robinson in custody. Mrs. Stoll arrived at her home that evening, and that same evening, at the request of F. B. I. agents initialed 94 five dollar bills (R. 806). Dr. Frazier was called in to see Mrs. Stoll upon her return to Louisville, and testified that her scalp abrasion had healed, but he did not state what had, or could have, caused the healed injury.

Mr. Berry Stoll, husband of Mrs. Alice Stoll, stated to a Jefferson County police officer, named Long, who had been assigned to the Stoll premises to guard them, that Mrs. Stoll felt better from the experience than she had

been feeling before, adding that: "From the excitement it seems like it has cured the nervousness some" (R. 1020). This policeman also testified that he saw Mrs. Stoll following her release and talked to her, and that she did not appear to have been injured; that she said she felt all right and that she was not complaining (R. 1020).

The indictment charges, and there was some testimony to the effect that Mrs. Stoll was not released unharmed (R. 541-545), but it is most vehemently insisted by petitioner that Mrs. Stoll was in sound physical condition when she left the Indianapolis apartment. The record does not disclose that Mrs. Stoll made any complaint of injury or suffering or requested any treatment at the drug store where she called a taxicab, or while at the Clegg home in Indianapolis, or while with the F. B. I. agents on the journey from Scottsburg, Indiana, to Louisville.

After leaving the apartment in Indianapolis on the morning of October 16, 1934, Robinson, Jr., made his way to New York City and eventually to Glendale, California, where, as above stated, he was taken in custody by F. B. I. agents on May 11, 1936, was returned to Louisville, illegally sentenced to life imprisonment, and, after serving over seven years on the illegal sentence, was released on a writ of *habeas corpus,* retried at Louisville and found guilty, and sentenced to death on December 13, 1943.

At the trial petitioner filed copies of the insanity decrees as exhibits (R. 897-901). The trial court in its instructions informed the jury that the presumption of insanity continued until the contrary was proven by the Government beyond reasonable doubt (R. 1510).

On behalf of petitioner, Dr. H. B. Brackin, former staff psychiatrist of Central State Hospital, testified that in his opinion the petitioner was insane, suffering from the schiz-

ophrenic type of dementia praecox, in 1929, and that before and after October, 1934, that he did not have control over his will (R. 1139).

By agreement, the affidavit of Dr. Horace Gayden was read by Dr. Brackin into the record. That affidavit showed that between the dates of May 28, 1932, and October 4, 1932, he and his brother treated petitioner for syphilis (R. 1096, 1097).

There was next presented on petitioner's behalf Dr. Leon L. Solomon and Dr. Thomas J. Crice, of Louisville, both well known and well qualified psychiatrists, who testified that they had conducted a thorough examination of petitioner extending over a period of several weeks, and in answer to a hypothetical question (R. 1203-1218) propounded by counsel for petitioner, they stated that in their opinion the petitioner on, before and after October 10, 1934, did not know right from wrong; did not have sufficient willpower to govern him in his ability to distinguish between right and wrong and that he could not resist his impulses to accomplish his act (R. 1218, 1219).

In rebuttal the Government presented Dr. E. W. Cocke, former superintendent of Western State Hospital (R. 1289-1312), who testified that in his opinion petitioner was not insane when held at that institution, but was a "psychopathic personality" (R. 1289-1312). Despite his opinion that petitioner was sane, Dr. Cocke stated that he held, and would have continued to hold, petitioner in the insane asylum (R. 1296). Dr. Cocke advised petitioner's father against removing him from the hospital (R. 1297).

There was also introduced in rebuttal Dr. Singleton, prison psychiatrist at Leavenworth Penitentiary, and Dr. Richey, prison psychiatrist at Alcatraz Penitentiary (R. 1326-1341), who testified that they examined petitioner

between 1936 and 1939, and that in their opinion he was sane but "constitutionally psychopathic" at the time of their examination (R. 1326-1341).

The Government also presented in rebuttal Drs. Landis, Kimbell, Ackerly, and Gardner, four psychiatrists of Louisville, who, in response to a hypothetical question (R. 1373-1387) propounded by counsel for the Government, testified that in their opinion petitioner was not insane on October 10, 1934 (R. 1365-1370). They stated that in their opinion petitioner was not then, and was never, a psychopathic personality (R. 1387, 1396), as diagnosed by Drs. Cocke, Singleton and Richey, the other psychiatrists who appeared for the Government. These four doctors had been appointed by the Court October, 1943, for the sole purpose of examining petitioner's present mental condition. Petitioner's conusel was present at the examination in the jail and questions and answers were confined to the time the examination was being made, excluding everything that had happened prior to that date of the examination (R. 1393-1395).

This summary of the psychiatrical evidence completes petitioner's presentation of the material facts in the case.

QUESTION PRESENTED.

1. Whether the statute involved, to-wit, the Act of June 22, 1932, c. 271, Section 1; 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 781 (Title 18, Section 408a, U. S. C. A., commonly known as the Lindbergh Act) is unconstitutional because too vague and indefinite and prescribing no fixed or ascertainable standard of guilt or punishment.

2. Whether the rights of the petitioner have been infringed under the Fifth and Sixth Amendments to the Constitution of the United States by the trial, conviction and sentence of petitioner under the aforesaid statute.

3. Whether this is a capital case;

(a) Whether petitioner violated the said Lindbergh Act.

4. Whether Count Two of the indictment, under which petitioner was tried, convicted and sentenced is void, and the rights of petitioner, as guaranteed under the Fifth and Sixth Amendments to the Constitution have been denied him.

5. Whether the proviso in said Lindbergh Act, in these words:

> "provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed."

qualifies and restrains the generality of the substantive enactment, to which it is attached, as to be a component part of the enacting clause

(a) Whether the aforesaid proviso is vague and indefinite and therefore unconstitutional;

(b) Whether the aforesaid proviso, if unconstitutional, is separable from the statute as a whole; or whether the entire statute, of which it is a part, is inoperative;

(c) Whether the aforesaid proviso constitutes an ingredient of the offense, or merely relates to the punishment; if the latter, is petitioner yet entitled to be informed of the punishment that may be inflicted upon him by law?

(d) Whether the death penalty was intended to be inflicted regardless of the time when inflicted or the degree of injury inflicted.

5a. Whether the question of the invalidity of said statute can be solved by resorting to the intent of the Legislature.

6. Whether, by the District Court permitting misconduct on the part of the District Attorney and Assistant District Attorney, in the presence of the jury, and permitting them to make highly inflammable, caustic, and out-of-the-record remarks, particularly their closing remarks, which swayed the jury and influenced it to render a verdict of guilty and recommend the imposition of the death penalty; and by not instructing the jury to disregard such remarks and misconduct, or in discharging the jury, the petitioner was denied due process of law.

6a. Whether petitioner, by being convicted and sentenced to death upon an offense not contained in the Lindbergh Act nor charged in the indictment, was denied due process of law.

6b. Whether the District Court prejudicially abused discretion by failing to sustain motion to arrest judgment and motion for a new trial, and by failing to grant petitioner a new trial, in view of the fact the conviction was on a charge not made, and that the Court declared it was its opinion that the jury would not have recommended the death penalty and the Court would not have imposed it, except for petitioner's statements about his relations in 1931 with the kidnaped victim—some three years prior to the time of the commission of the alleged offense, and even prior to the enactment of the Lindbergh Act (R. 1547).

7. Whether the trial and proceedings were conducted in such an unfair manner as to deprive petitioner of a fair and impartial trial, and as to deny him due process of law.

8. Whether the Court below erred in affirming the judgment.

9. Whether the indictment under which petitioner was tried, convicted and sentenced is demurrable:

(a) Because duplicitous;

(b) Because it fails to set forth with certainty the nature and cause of the accusation;

(c) Because it contains acts which are constructive offenses;

(d) Because it should have set forth, with particularity, essential facts constituting such aggravation of the offense charged as to increase the punishment to death.

9a. Whether if the aforesaid statute is unconstitutional, specification of details in the indictment would cure the invalidity.

10. Whether the injuries to the victim, if inflicted prior to kidnaping and transportation in interstate commerce, merged into the statutory offense of transporting a kidnaped person, and made the death penalty applicable:

(a) Whether the evidence was sufficient to establish that petitioner inflicted the injuries claimed to be in existence upon release of the victim; if not, whether the question of the injured victim upon release should have been submitted to the jury;

(b) Whether the nature and degree of injuries control in the recommendation and infliction of the death penalty.

11. Whether the Government sufficiently established all essential elements of the offense alleged.

12. Whether petitioner was denied due process of law by the District Court's permitting the prosecution to reveal that petitioner had been charged with, but not convicted of, prior offenses:

(a) Whether proper to establish, by cross-examination of petitioner, that he had smeared, or attempted to smear, other women.

13. Whether, by permitting petitioner to be illegally impeached on cross-examination by incompetent questions and involuntary admissions, petitioner was denied due process of law:

(a) Whether admission elicited on cross-examination of petitioner was involuntary and because thereof amounted to denial of due process of law;

(b) Whether, in view of previous adjudications that petitioner had been denied due process of law because of prior insanity and denial of advice of counsel (Robinson v. Johnston, 50 F. S. 775), such prior adjudication was *res judicata* on the issue of the lack of advice of counsel when admission was made, voluntariness of the admission, and the admissibility in evidence of it.

(c) Whether refusal of District Court to hear evidence on voluntariness of such admission out of presence and hearing of jury was a denial to petitioner of due process of law.

14. Whether petitioner was twice placed in jeopardy for same offense.

15. Whether there was a failure by the Government to establish that Mrs. Stoll was held for ransom or reward before being transported in interstate commerce.

16. Whether evidence of the Government's fingerprint and handwriting expert witnesses should have been stricken:

(a) Whether the rule announced by this Court in the Erie-Railroad v. Tompkins case applies to Federal criminal cases, thus making it necessary for the Government to have complied with Kentucky Statutes by giving notice of intention to use handwriting and questioned-documents expert.

17. Whether petitioner was entitled to a directed verdict of acquittal.

17a. Whether Ann Woolet, the maid of Mrs. Stoll, one of the Government's main witnesses, should have been impeached.

18. Whether the District Court's instructions were erroneous:

(a) Whether that Court erred in refusing to give certain of petitioner's offered instructions.

19. Whether the District Court made such unfair and argumentative remarks to the jury as deprived petitioner of a fair trial.

20. Whether there was an unconstitutionally impaneled jury:

(a) Whether the alternate juror statute is constitutional;

(b) Whether the alternate juror was lawfully selected and allowed to serve.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Circuit Court of Appeals, Sixth Circuit, erred:

(I) In affirming the judgment

(a) In failing to hold that by the proceedings, trial, verdict and sentence petitioner was denied due process of law;

(b) In holding that Section 408a, Title 18, U. S. C. A., is not ambiguous;

(c) In deciding that the proviso of said statute, containing the words "liberated unharmed" relate to the punishment and do not constitute an element or

ingredient of the offense and therefore petitioner was not entitled to be informed of the punishment that might be inflicted upon him;

(d) In holding that there was no error in given or offered instructions;

(e) In holding that petitioner was not placed in jeopardy;

(f) In holding that the District Court's statements were ineffective to impeach the jury's verdict;

(g) In holding that the District Court did not make unfair comment on the testimony or unfairly deliver the charge to the jury;

(h) In holding that the jury's recommendation of the death penalty was justified by the evidence.

(i) In holding that the District Court did not err in overruling petitioner's motion for a new trial;

(j) In holding that petitioner was not improperly removed from California to Kentucky;

(k) In holding that letters to Prison Director Bates and F. B. I. Agent Smith were written without duress; that they were voluntary and admissible; and in failing to hold that the District Court should have determined the question of the voluntariness of said letters out of the hearing of the jury; and in failing to hold that the District Court should have taken judicial knowledge of petitioner's incompetency and lack of counsel advice when written, in accordance with the previous decision in Robinson v. Johnston, 50 F. S. 774.

(l) In holding that the alternate juror statute is constitutional, and that there was no error in selecting either the regular jury or the alternate juror, and that the jury selected was fair and impartial.

(II) The United States Circuit Court of Appeals, Sixth Circuit, erred in failing to hold that the District Court erred:

(a) In permitting, in the presence of the jury, misconduct on the part of the District Attorney and Assistant District Attorney, and permitting them to make highly inflammable, caustic, sarcastic, dramatic, and out-of-the-record remarks, particularly their closing arguments to the jury, which swayed and influenced the jury to convict petitioner and recommend the infliction of the death penalty; in not discharging the jury, and in failing to instruct the jury to disregard such remarks and misconduct.

(b) In not sustaining, and in overruling, petitioner's demurrer to Count Two of the indictment, because:

(1) It is indefinite;

(2) It is duplicitous, and charges more than one offense and fixes therein more than one punishment;

(3) It contains constructive offenses;

(c) In overruling petitioner's motion for directed verdict made at the conclusion of the Government's case and at the conclusion of all the evidence;

(d) In admitting, by way of cross-examination, evidence of prior offenses and threats to smear other women;

(e) In refusing to permit petitioner to impeach witness Ann Woolet, by holding that her statements were confidential as between attorney and client;

(f) In overruling petitioner's motion to strike the testimony of Government witnesses Knowles and Smith and related exhibits;

(g) In ruling that no prior notice, under Kentucky law, was required of the intention to use witness A. pell, handwriting and questioned document expert, and that the rule in the case of Erie Railroad v. Tompkins does not appiy in Federal criminal cases;

(h) In overruling petitioner's motion in arrest of judgment;

(i, j, k) In suffering petitioner to be convicted and sentenced for an offense not contained in the aforesaid statute nor made in the aforesaid indictment;

(l) In failing to rule that there was no evidence that petitioner inflicted the injuries claimed to have been in existence upon the victim's release, and in admitting evidence on the question of her physical condition at the time of release;

(m) In permitting petitioner to be twice placed in jeopardy for the same offense;

(n) In failing to rule that the Government failed to establish that Mrs. Stoll had been held for ransom or reward before being transported in interstate commerce, an essential requirement under the aforesaid statute.

REASONS FOR GRANTING THE WRIT.

Reason No. 1. Petitioner, first convicted and sentenced illegally on May 13, 1936, in the United States District Court, for the Western District of Kentucky, at Louisville, was denied relief on *habeas corpus* by two erroneous decisions (Robinson v. Johnston, 118 F. 2d 998), following which this Supreme Court of the United States granted certiorari and reversed and remanded the case to the United States Circuit Court of Appeals for the Ninth Circuit (U. S., *ex rel.* Robinson v. Johnston, 316 U. S. 649, 62 S. Ct. 1301, 86 L. Ed. 1196).

As a result of this Court's decision, the Ninth Circuit Court of Appeals reversed and remanded the case to the District Court in San Francisco (130 F. 2d 202); the District Court in San Francisco in turn granted and sustained the writ (50 F. Supp. 774), and petitioner was re-tried in the District Court at Louisville, convicted and sentenced to death for what he said of and about the alleged kidnaped victim, rather than the offense for which indicted, and by a trial which petitioner contends was not a fair and impartial trial, but a trial in which many grievous and prejudicial errors were committed; and that the entire proceedings, trial, verdict, judgment and sentence were illegal and in violation of his constitutional rights.

As it was at the instance of this, the Supreme Court of the United States, that petitioner was able to obtain relief from an illegal conviction and sentence upon the same identical charge and indictment, he respectfully submits that this Court should grant the writ and review the case in order to again safeguard his legal and constitutional rights from infringement by those lower courts which assumed jurisdiction over him following this Court's decision, because to refuse the writ now would mean that the protection from infringement heretofore placed by this Court around petitioner's legal and constitutional rights would all have been in vain and to no avail, and these subsequent violations of petitioner's substantial rights by the lower courts would amount to a virtual interference with this Court's jurisdiction heretofore acquired.

Reason No. 2. The issue as to the constitutionality of, and the construction placed by the courts below on, the Act of June 22, 1932, c. 271, Section 1; 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 781 (Title 18, Section 408a, U. S. C. A., commonly known as the Lindbergh

Act) involve important questions of Federal law which have not been, but should be, decided by this Court.

Reason No. 3. The statute aforesaid, commonly known as the Lindbergh Act, containing the proviso:

> "* * * provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed,"

is unconstitutional, in that it is not sufficiently explicit to inform those subject to it what conduct will render them liable for penalties, and is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; and the words and phrases embodied therein fix no ascertainable standard of guilt and forbid no specific or definite act, and it is, therefore, repugnant to the Constitution, because the harm, or freedom from harm, may relate to any time during the period of captivity; it may relate to the moment of release of the victim, or it may relate to the time of the imposition of sentence in court. And the term "liberated unharmed" is a generic term; has no well defined or ascertainable meaning, and is indefinite. The statute which contains the term is silent as to whether it means bodily injuries, mental disturbances, permanent or temporary injuries. It admits of varying degrees of meaning, ranging from slight injuries to grave injuries, and is susceptible of so many interpretations and constructions that the citizen may act upon one conception of its meaning and the courts and juries upon others.[12]

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[12]Vierick v. U. S., 318 U. S. 236, 63 S. Ct. 561, 565:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids * * * And the statute fails to indicate what constitutes membership or how

Reason No. 4. While some courts have had occasion to construe the constitutionality of certain phases of the Lindbergh Act, yet no court, save the Sixth Circuit, in this case, has as yet construed the words of the aforesaid proviso in determining the constitutionality of that Act. And the fact that the court below on so vital an issue as this cited but one authority—and that a textbook—shows inherent weakness in its decision.

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one may join a 'GANG.' Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618.

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violate the first essential of due process of law. * * *Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another. Connally v. General Construction Company, 269 U. S. 385, 46 S. Ct. 126.

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement. * * * This important element (of what constitutes a crowded car) cannot be left to conjecture, or be supplied by either the Court or the jury. * * * Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68.

"The sole remaining inquiry, therefore, is * * * whether the words * * * 'to make any unjust or unreasonable charge in handling or dealing in or with any necessaries' constituted a fixing by Congress of an ascertainable standard of guilt. United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 299.

International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853;
Stromberg v. People of California, 283 U. S. 359, 368, 51 S. Ct. 532, 535;
Weeds, Incorporated v. United States, 255 U. S. 108, 41 S. Ct. 306;
Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732;
Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582.

"The meaning of the word 'Waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling." Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 52 S. Ct. 559.

The issue of whether the aforesaid Act, containing the aforesaid proviso, is constitutional, involves important questions of Federal law and of great public importance which have not, but should be, decided by this Court.

Reason No. 5. The Sixth Amendment to the Constitution is a guarantee that: "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *." The charge in the indictment, "and did not liberate her unharmed" is part of the nature and cause of the accusation. Petitioner is entitled to be informed of that *accusation* in clear, definite, and specific language. Even though the "unharmed" provision may be said to relate to the punishment, it is *an essential element of the nature and cause of the accusation.* If the "not-liberated-unharmed" provision had been omitted from the indictment, the death penalty could not have been imposed. It is an essential element of the statutes and of the accusation and does not merely relate to the punishment.[13]

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[13]The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached." Cox v. Hart, 260 U. S. 427, 43 S. Ct. 154-157.

"The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality." U. S. v. Morrow, 266 U. S. 531, 45 S. Ct. 173.

"If an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative." Connolly v. Union Sewer Pipe Company, 22 S. Ct. 431, 184 U. S. 540. State v. Levitan, 210 N. W. 111, at p. 119.

"Here it is not possible to separate that which is constitutional from that which is not. * * * They must therefore be adjudged altogether invalid." Butts v. Merchants and Miners Transportation Co., 230 U. S. 126, 33 S. Ct. 964.

"We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." McFarland v. American Sugar Refining Company, 241 U. S. 79, 36 S. Ct. 498.

"It is suggested that the provision for *imprisonment* * * * is separable from the accessory punishment, and that the latter may

The Act reworded would read: "Whoever shall knowingly transport in interstate commerce any person who shall have been unlawfully kidnaped and held for ransom or reward or otherwise, and who fails to liberate said kidnaped person unharmed, shall upon conviction be punished by death if the verdict of the jury shall so recommend." By thus transposing the proviso, it is obvious that it is an essential element of the nature and cause of the accusation. Also, the proviso unquestionably so qualifies and restrains the generality of the enacting clause or substantive enactment to which it is so closely attached as to be an integral, inseparable, component part of the offenses denounced, without which it is reasonably sure the Legislature would not have enacted the other sections.

When an inseparable proviso or clause is unconstitutional, the whole statute must be declared invalid.

The holding by the court below that the aforesaid proviso does not constitute an element or ingredient of the offenses denounced in Section 408a, but that it relates to the punishment; and that there is nothing in the Constitution which grants the accused the right to be informed of the punishment that may be inflicted upon him by law, is in conflict with fundamental bases of construction of criminal statutes and indictments; is in conflict with decisions of this Court; is in conflict with decisions of other Circuit Courts of Appeal, and in conflict with leading decisions of other courts.

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be declared illegal leaving the former to have application. * * * It was put into force as it existed, with all its provisions dependent. We cannot, therefore, declare them inseparable. Weems v. United States, 217 U. S. 349, 30 S. Ct. 544, 555.

"* * * the courts incline toward treating a penal statute as void in its entirety whenever one section or *clause* is clearly unconstitutional." American Jurisprudence, "Constitutional Law," Section 166.

Reason No. 6. The holding of the court below that the demurrer to the indictment is bad, and that the language "and did not liberate her unharmed" contained therein is not ambiguous or indefinite, is in conflict with the fundamental bases of construction of criminal statutes and indictments and in conflict with decision from this Court and other Circuit Courts of Appeal to the effect that, in an indictment upon a statute, it is not sufficient to set forth the offenses in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent, and that such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.

U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135;
U. S. v. Cruikshank, 92 U. S. 542;
U. S. v. Simmons, 96 U. S. 360;
U. S. v. Hess, 8 S. Ct. 571;
Harris v. U. S., 104 F. 2d 41;
Foster v. U. S., 253 Fed. 481.

Reason No. 7. The court below, in failing to hold the aforesaid indictment duplicitous and demurrable because containing constructive offenses; and more than one offense and prescribing different punishments, is in conflict with decisions of this Court and decisions of other Circuit Courts of Appeal, and in conflict with the fundamental bases of construction of criminal statutes and indictments to the effect that the question of whether or not there are

two offenses depends upon whether each offense requires proof of a fact which the other does not. Applying that formula to the holding of the court below that: "petitioner might have been convicted without any showing that Mrs. Stoll was liberated at all"; it is obvious that the indictment is duplicitous because it charges the one offense of transporting a kidnaped person, for which the maximum punishment is life; and charges the additional offense, in the same count, of failing to liberate unharmed a kidnaped person, for which the maximum punishment is death.

And the further failure of said lower court to hold that the indictment charges a constructive offense not within the purview of the statute; *i. e.*, that petitioner, with others, "did • • • beat, injure, bruise and aided and abetted each other in beating, injuring, bruising and harming the said Mrs. Alice Stoll" • • • is in further conflict with decisions of this Court and of other Circuit Courts of Appeal:

Blockburger v. U. S., 234 U. S. 299, 52 S. Ct. 180;
Albrecht v. U S., 273 U. S. 1, 47 S. Ct. 250, 253, 254;
Creel v. U. S., 8th Cir., 21 F. 2d 690;
U. S. v. Hopkins, 290 F. 619;
Schultz v. Zerbst, 10th Cir., 73 F. 2d 668;
U. S. v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37;
Fasulo v. United States, 272 U. S. 620, 47 S. Ct. 200;
U. S. v. Resnick, 299 U. S. 207, 57 S. Ct. 126;
U. S. v. Chase, 135 U. S. 255, 10 S. Ct. 756;
Karem v. U. S., 6th Cir., 121 Fed. 250;
State v. Mattison, 100 N. W. 1091.

Reason No. 8. By charging in the indictment that petitioner failed to release the victim unharmed, there was attempted to be charged an aggravated offense, the punishment for which ~~should~~ could be increased from a maximum of life to death.

The holding of the court below that the aforesaid indefinite "unharmed" proviso furnished a basis for proof as to what extent the offense was aggravated, is in conflict with decisions of other Circuit Courts of Appeal, and with the fundamental bases of construction of criminal statutes and indictments to the effect that when an indictment charges an offense the punishment upon conviction for which may be aggravated, the facts constituting such aggravation as will increase the statutory punishment must be plainly charged or they are not confessed by a plea nor established by a verdict of guilty.

Meyers v. United States, 5th Cir., 116 F. 2d 601;
Aderhold v. Pace, 5th Cir., 65 F. 2d 790;
1 Bishop's Cr. Pro., Sections 77, 80, 84 (quoted in Aderhold case);
Goodman v. State (Texas), 172 S. W. 2d 94.

Reason No. 9. The Court below concedes that the District Attorney, in his closing remarks, overstepped the bounds of propriety (p. 22 of the printed opinion) by stating: "These statements, strictly speaking, overstepped the bounds. We have examined them in connection with the entire argument and we regard them as isolated expressions which could have no prejudicial effect." The resulting death penalty recommendation and the statements of the District Court wherein it stated its views on why the jury recommended the extreme penalty is a sufficient reply. In concluding that such misconduct did not constitute prejudicial error the Court failed to give effect to decisions of this Court and of other circuit courts of appeal.

Berger v. U. S., 295 U. S. 76, 55 S. Ct. 628.

"As the case must be remanded to the district court for further proceedings, we direct attention to conduct of the prosecuting attorney which we think

prejudiced petitioner's right to a fair trial, and which, independently of the error for which we reverse, might well have placed the judgment of conviction in jeopardy."

Vierick v. U. S., 318 U .S. 236, 63 S. Ct. 561-566:
U. S. v. Sprengel, 3d Cir., 103 F. 2d 876, 884;
Minker v. U. S., 3d Cir., 85 F. 2d 425;
Turner v. U. S., 8th Cir., 35 F. 2d 25;
Pierce v. U. S., 6th Cir., 86 F. 2d 949;
Ward v. U. S., 5th Cir., 96 F. 2d 189;
Pharr v. U. S., 6th Cir., 48 F. 2d 767, at p. 771;
Beck v. U. S., 8th Cir., 33 F. 2d 107;
Turk v. U. S., 8th Cir., 20 F. 2d 129;
Taliaferro v. U. S., 9th Cir., 47 F. 2d 699;
U S. v. Atkinson, 297 U. S. 121, 56 S. Ct. 390;
Brassfield v. U. S., 47 S. Ct. 135.

Reason No. 10. The failure of the lower court to hold that the charge to the jury and the District Court's comment on the evidence was so argumentative as to prevent petitioner from having a fair trial;[14] and in holding that the said District Court did not make unfair comment upon the testimony of some of petitioner's witnesses, and that in so doing the Court's manner of speech, tone of voice and articulation were not prejudicial, and that the charge was fair and impartial, is in direct conflict with decisions of other circuit courts of appeal.

Sunderland v. U. S., 8th Cir., 19 F. 2d 202, p. 216;
Weare v. U. S. 8th, 1 F. 2d 617.

Reason No. 11. The holding by the Court below that the District Court's remarks in the following words were

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[14]On the important issue of whether the victim had been harmed, making possible the infliction of the death penalty:

"I call your attention to the fact that in order for a cut to be partially healed, it must have been inflicted prior thereto.

"On this disputed question of fact the evidence in my opinion is overwhelmingly in favor of the Government's contention that the transportation from Louisville, Kentucky, to Indianapolis, Indiana, was unlawful and against the will of Alice Stoll."

(R. 1509)

insufficient to set aside the verdict: "It seems to me that this jury would never have recommended the death penalty in this case except for the effect which they gave to the defense that the defendant made representing the relations between him and Mrs. Stoll. I believe if that contention had not been made, this jury would never have recommended the death penalty," is in conflict with decisions of other circuit courts of appeal to the effect that, while recognizing the general rule against impeaching verdicts, a conviction upon a charge not made amounts to denial of due process of law and cannot stand; and that if the nature of the extraneous influence before the jury is such that it would be prejudicial if acted upon, the aggrieved party is not required to disclose by affidavits or testimony that the jurors actually considered it and that where it is patent extraneous influences are believed to have affected the jurors while engaged in deciding whether the death penalty should be recommended, the courts are solemnly required to grant a new trial, even if the effect is to impeach the verdict.[15]

U. S. v. Dressler, 7th Cir., 112 F. 2d 972 (a kidnaping case involving the death penalty);
Williams v. North Carolina, 317 U. S. 267, 63 S. Ct. 207;
Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736;
DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255;
Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532;

[15]It seems to me that this jury would never have recommended the death penalty in this case except for the effect which they gave to the defense that the defendant made representing the relations between him and Mrs. Stoll. I believe if that contention had not been made, this jury would never have recommended the death penalty. That is my own view, but from my experience and from my own thought in the matter, I doubt very much, even if they had made such a recommendation, the Court would have considered it, except for the testimony on the part of the defendant, which I am accepting as untrue as the jury so found it, and, as I have stated, at the time I thought the Government's evidence overwhelmingly supported their contention in the matter. (R. 1547)

The Schooner Hoppet and Cargo v. U. S., 7 Cranch, 389, 3 L. Ed. 380;
Commonwealth v. Richardson, 48 N. E. 2d 678.

Reason No. 12. The holding of the Court below that two letters in the nature of involuntary confessions or admissions, written by petitioner while an inmate of the Federal Penitentiary at Leavenworth on July 1, 1936, shortly after petitioner originally pleaded guilty and was illegally sentenced and gotten into evidence by way of cross-examination of petitioner, were written without the slightest duress or constraint, and were wholly voluntary, is in conflict with the wholly undenied and unrefuted testimony of petitioner that he was induced to write them upon the promise and persuasion by the prison warden that if petitioner would write them he would be taken out of prison isolation and would be eligible for parole; and such holding of the Court below is in conflict with decisions of this Court and other circuit courts of appeal to the effect that any inducement, however slight, vitiates such admissions; is in conflict with the McNabb and kindred decisions; is in conflict with decisions to the effect that an insane person's confession or admission is void; is in conflict with decisions of this Court (Johnson v. Zerbst) to the effect that one charged with crime is entitled to advice of counsel at every stage in proceedings; and is in conflict with decisions to the effect that an accused may not be impeached by incompetent evidence; and is in conflict with decisions to the effect that the question of the voluntariness of confessions and admissions must be determined first by the Court out of the presence and hearing of the jury.

Feldman v. U. S., 64 S. Ct. 1082;
McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608;
Bram v. U. S., 42 L. Ed. 568, 18 S. Ct. 183;

Ashcraft v. Tennessee, 64 S. Ct. 921;
Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524;
People v. Shroyer, 168 N. E. 336, 336 Ill. 324;
Harold v. Territory of Oklahoma, 169 Fed. 47.
Cohen v. U. S., 7th Cir., 291 F. 368;
Toosisgah v. U. S., 10th Cir., 137 F. 2d 713.
Gullota v. U. S., 113 F. 2d 683, 686 (8th Cir.);
Tuttle v. People, 79 Pac. 1035;
Wood v. U. S., 128 F. 2d 265 (U. S. Ct. of App. for Dist. Col.).

Reason No. 13. The holding of the court below that there was no prejudicial error in the admission of evidence tending to show the commission of prior offenses by petitioner is in conflict with decisions of this Court and with decisions of other Circuit Courts of Appeal to the effect that however depraved in character and however full of crime their past lives may have been, defendants are entitled to be tried upon competent evidence and only for the offense charged.

Boyd v. U. S., 35 L. Ed. 1077, 12 S. Ct. 292;
U. S. v. Dressler, 7th Cir., 112 F. 2d 972 (kidnaping case).

Reason No. 14. The holding by the court below that petitioner was not twice put in jeopardy for the same offense, is in conflict with decisions of this Court and with decisions of other courts that one may not be twice put in jeopardy for the same offense, and that after judgment has been executed on the criminal he can not again be sentenced to another and different punishment.

Ex Parte Lange, 21 L. Ed. 872;
People v. Warden of Nassau County Jail, 199 N. E. 647;
Corpus Juris Secundum, Sec. 245, subject "Criminal Law."

Reason No. 15. The holding of the court below that the Federal alternate juror statute is not unconstitutional, and that the participation by the alternate juror chosen in the trial, deliberation of the jury and verdict, occasioned by the illness of one of the regular jurors who was forced to withdraw from the jury was not an invasion of petitioner's constitutional right to trial by a jury of twelve, as provided by the Sixth Amendment, and by Article II, Sec. 2, Cl. 3 of the Constitution; and the holding by the lower court that there was no abuse of judicial discretion in denying petitioner five challenges for cause of five jurors, involve important questions of Federal law, some of which have but others have not been, but should be, decided by this Court.

Wherefore, it is respectfully prayed that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings of that Court had in this case, which is numbered and entitled on its docket 9754, Thomas Henry Robinson, Jr., v. United States of America, to the end that this cause may be reviewed and determined by this Court, and that the judgment of that said Court be reversed, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper.

THOMAS HENRY ROBINSON, JR., *Pro Se,*
Petitioner.

ROBERT E. HOGAN, Louisville, Ky.,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

The Facts.

Petitioner relies upon the facts as summarized in the petition herein and, due to the necessary length of the petition, additional facts will not be restated in this brief except to the extent considered necessary to the argument of the law.

ARGUMENT.

I.

The Court Erred in Not Holding that the Misconduct of the Prosecuting Attorney Was Prejudicial: and in Not Holding that the District Court Made Unfair and Argumentative Comment Upon the Testimony of Petitioner's Witnesses.

By reference, and in order to keep this brief within the bounds of reasonable limits, there is made a part of the argument in support of these points the statement of facts contained in the petition, and the objectionable portion of the District Attorney's closing arguments to the jury and the unfair and argumentative comments of the District Court, appearing in the footnotes. There is here also incorporated by reference the wording of the statute involved and the language of Count Two of the indictment.

There is first of all presented the vital question of how any fair and impartial jury could have recommended the infliction of the death penalty upon petitioner for an offense for which he had been illegally sentenced to life imprisonment and for which he had served more than seven years in prison, over six years of which illegal sentence he had

served in Alcatraz Island Penitentiary, termed by petitioner as "America's Torture Chamber." Especially is this question pertinent in view of the further wholly undisputed facts that the alleged kidnaped victim, Mrs. Alice Stoll, did not sustain any injuries, if any, of a permanent nature, because she appeared in court and testified as the main prosecuting witness for the Government. Not one single word flowed from her lips at the trial to indicate that she was suffering in any way from the effects of the alleged kidnaping. Nor was there any refutation whatsoever of the testimony of former Jefferson County Police Officer Long, assigned to the Stoll estate as a police guard, that when Mrs. Stoll returned from Indianapolis in October, 1936, where she had been taken, she appeared to be in excellent physical condition; nor was there any refutation of his testimony that Berry Stoll, her husband, admitted to him that the ordeal through which his wife had just gone had apparently cured her of her former nervousness.

None but an impassionately influenced jury would have recommended infliction of the death penalty under the facts of this case.

It should be noted at this point that petitioner was charged with the offense of transporting in interstate commerce one who had already been kidnaped. He was not charged with smearing other women, or attempting to, nor for what he might have related concerning his previous relations in 1931 with the alleged kidnaped victim.

The answer to the question is to be found in two things: (1) The prejudicial misconduct of the prosecuting attorney and (2) the unfair comments of the District Court upon the testimony of petitioner's witnesses and the unfair manner and tone of voice with which the District Court delivered his charge to the jury and commented upon certain phases

of the case and testimony. The cumulative effect of the actions of the prosecuting attorney with those of the District Court gave the jury the unmistakable impression that not only did the Government want a conviction but that it was demanding of the jury nothing short of the infliction of the death penalty. When the prosecuting attorney concluded his closing argument to the jury the District Court immediately followed with its unfair comments and charge. The cumulative effect was to take the jury by the hand and lead it into recommending the death penalty.

The prosecuting attorney not only made inflammatory and prejudicial remarks, but went completely outside the record and literally testified in his closing argument to facts outside the record, which were not only prejudicial, but which denied the petitioner's counsel the right of cross-examination. The most outstanding, objectionable, caustic, hearsay portion of his remarks were in these words: (R. 1494-1499)

> "I think the hardest thing I have ever done in my life, and a day that I will always remember, was when I explained to Mrs. Stoll what she would probably have to face. I told her that I didn't know it, but I suspected it. I can see the horror and the disgust and the loathing that came over that little woman's face that night. That had never occurred to her before. You saw her, 'Someone has to do it. I might as well be the one.' And so, I put her on that stand. You saw her, how shaken she was. You heard her story. If I have ever heard a truthful story, that was one. I did not know at what moment the attack of smear campaign would start * * *
>
> "We were stymied how to find a person named Allen, how to find some people named Palmer. When there was, Oh, so little time left. So we started out all that night to work, and we finally found some people named Palmer had operated a tourist camp in Nashville. We checked there and found they lived in At-

lanta. We found a man named Allen that had operated it now lives somewhere in the Portland Avenue section of Louisville. That's all we had to go on. A good woman's reputation opens all doors. When we explained what we were up against to the people interviewed, we found a response that to me was simply amazing. On the telephone, I had no power to bring Mr. and Mrs. Palmer up here from Atlanta, over the telephone, no power at all. They were busy people, they were people of affairs, they had their own business in Atlanta, and here I, some person they had never heard of before, when the F. B. I. had finally located them, on the telephone, asking that they come, 'I can't, Mr. Brown. We are busy.' 'You must come. It will help save a good woman's reputation.' These people asked no more. They said, 'We will come. We will come on the first train and we will stay there, if we can save that woman. * * *'

"So what does that mean, ladies and gentlemen of the jury, if your verdict be 'Not Guilty.' He walks out of the court room a free man. He is sane now. He has made that claim. The doctors that have examined him said that in their opinion he was sane, and is sane, as of October 11, 1943. This man walks out a free man to resume whatever acts he desires to resume. On past performance those acts will not be good. *On past performance, the mothers and the fathers of young women are running a terrible risk.* * * *

"I am going to close now and leave you one thing: 'And he that stealeth a man and selleth him or if he be found in his hands, he shall surely be trodden down.' "

How could petitioner even begin to hope for a fair verdict under such circumstances? The purpose of the law is to guarantee to every man a fair trial. The petitioner in this case did not have even the semblance of a fair trial. The persistent efforts all throughout the trial of the prosecuting attorney to get before the jury the idea that petitioner was a ruthless prior criminal and smearer of women,

who had escaped punishment only by hiding behind the veil of insanity, in spite of the fact that two different juries in two courts had declared petitioner insane, was a complete stage setting for the dramatically-delivered inflammatory remarks of the prosecutor which followed. Add to that the Court's unfair comments and unfair charge, and the net result is that a fair trial was made impossible, and petitioner was thus denied due process of law.

Right recently this Court has spoken out in no uncertain terms and condemned such practice on the part of the prosecuting attorney. In *Vierick* v. *U. S.*, 318 U. S. 236, 63 S. Ct. 561, 566, this Court stated that the remarks of the prosecuting attorney, independently of other errors, prejudiced petitioner's right to a fair trial. A comparison of the remarks in the Vierick case with those in the instant case clearly demonstrates that the misconduct of the prosecutor in the instant case, coupled with the unfair comment of the District Court, greatly exceed the prejudicial error in the Vierick case which this Court thought sufficient to prejudice Vierick's right to a fair trial.

In the instant case, it is impossible to calculate how much effect such actions and words had upon the jury. There is one thing certain—the jury did not resolve any doubt in petitioner's favor for they recommended the imposition of the extreme penalty of death.

In U. S. v. Sprengel (3d Cir.), 103 F. 2d 876, 884, it was held that the remarks: "We have got to convict these people. They will go wild with this kind of thing. The only way it can be done is by conviction" was prejudicially improper. In the instant case the prosecutor at one point in his argument said this: "So what does that mean • • • if your verdict be 'Not Guilty.' He walks out of the court room a free man.• • • On past performance, the mothers

and the fathers of young women are running a terrible risk."

In Pharr v. U. S., 48 F. 2d 767 (6th Circuit), the very one which affirmed the judgment in this case, denounced similar remarks as highly prejudicial, in these words: "The references by counsel for the government, in his concluding argument, to the misfortunes of, widows and orphans resulting from the wrecking of the bank were in no sense pertinent to the presentation of the issues of the case, and were highly prejudicial."

The same Sixth Circuit, in U. S. v. Pierce, 86 F. 2d 949, said:

> "Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow, as in Pharr v. U. S." (*supra*).

In *Taliaferro* v. *U. S.*, 47 F. 2d 699 (9th Circuit), the prosecuting attorney stated in his closing argument that he knew certain facts of his own knowledge. In denouncing that conduct, the Court said:

> "Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subject to a trial upon the unsworn statement of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence. The district attorney has no right to make statements in argument upon his own knowledge, or upon anything else that is not contained in the record."

As will be seen elsewhere in this petition, the District Court stated it was his opinion the jury would not have recommended the death penalty had it not been for petitioner's alleged prior relations with the victim. Petitioner was not indicted for that as an offense. In Turk v. U. S., 20 F. 2d 129 (8th Circuit), the U. S. Attorney said that any time a guilty man is released by a jury "Why, it is simply a red flag, you might say, to others to engage in law violations." The Court denounced such tactics. It had this to say:

> "It is as fatal to a fair trial and a lawful conviction of a defendant by a jury that their verdict was for a wrong and unlawful reason as that it was caused by incompetent evidence or an erroneous charge * * * he could not be lawfully convicted because he was a wholesaler rather than a retailer, or because the release of a guilty man by a jury 'is simply a red flag as you might say to others to engage in law violations.' The jury ought not to have been urged by counsel to convict the defendant for any of these alleged reasons and counsel must not expect approval by the court of verdicts sought or obtained on such grounds. When such reasons for verdicts are urged by counsel, it is difficult, if not impossible, to determine whether the verdicts were based on lawful or on unlawful grounds."

In *Sunderland* v. *U. S.*, 19 F. 2d 202, at p. 216 (8th Circuit), that Court had occasion to define what is meant by a fair trial, and whether or not certain remarks made by the Court in charging the jury were so unfair as to amount to a denial of a fair trial. This is found in the opinion:

> "It is further contended that the charge to the jury was so argumentative as to prevent plaintiffs in error from having a fair trial. Throughout the charge to the jury are such expressions as 'The evidence jus-

tifies the claim of the government'; 'The government is justified apparently in claiming'; 'The evidence further discloses'; 'The evidence further shows'; 'It is further shown to me clearly by the evidence'; 'The evidence would further indicate to me'; 'I find little dispute about it in the testimony.'

"While the judge in the federal courts may comment on the evidence and express his opinion on the facts, provided he clearly leaves to the jury the decision of fact question (Weare v. U. S., 1 F. 2d 617 (C. C. A. 8th), yet, as was said in the same case 'the instructions, however, should not be argumentative. The court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. Dillon v. U. S., 279 F. 639. It should not be permitted to do indirectly what it cannot do directly, and by its instructions to in effect argue the jury into a verdict of guilty. * * * We think that the charge in the case at bar, taken as a whole, was clearly argumentative."

Compare, then, the comment in the instant case of the District Court at one point in his charge when this statement was made:

"On this disputed question of fact, the evidence in my opinion is *overwhelmingly* in favor of the Government's contention that the transportation from Louisville, Kentucky, to Indianapolis, Indiana, was unlawful and against the will of Alice Stoll."

(R. 1509)

That statement accomplished indirectly what could not be done by the District Court directly; that is, by that comment the Court argued the jury into a verdict of guilty on the main issue of the case, whether petitioner unlawfully transported Mrs. Stoll, while kidnaped, in interstate commerce. The jury undoubtedly got the impression that the District Court, as well as the prosecuting attorney, wanted a conviction.

The trial court in its charge to the jury and comment on the testimony (R. 1500-1518) exerted what petitioner claims was a concerted effort to literally "pick to pieces" each defense asserted by petitioner and each bit of the supporting testimony of petitioner's witnesses. Space will not here permit of quotations from the Court's charge, but petitioner adopts by reference the Court's remarks found in the printed Record. Instances of such unfair comment are the Court's unwarranted attack and comment upon whether or not Drs. Leon Solomon and Thomas J. Crice, psychiatrists who testified on behalf of petitioner, were members of the Jefferson County Lunacy Commission. The purpose and effect was to destroy the effect of their testimony on the main question and defense of petitioner's insanity; the unwarranted comment on whether petitioner's actions amounted to those of an insane person; the unfair comment upon the credibility of witness Kirtley, who testified, on behalf of petitioner, that while operating a taxicab along the streets of Louisville he had seen Mrs. Stoll on the day of the alleged kidnaping riding with petitioner and that she was not bound nor gagged and made no effort to attract any one's attention; and to comment upon various other phases of testimony which had a destructive effect on petitioner's defenses.

There is a complete absence of any remark by the Court of a destructive nature to any of the Government's testimony. Just why the Court chose to "pick" on the testimony offered in petitioner's behalf is not known.

The jury unquestionably got the impression that the Court was on the side of the prosecution and wanted not only a conviction, but the death penalty. Juries are swayed tremendously by the Court.

It is submitted that the misconduct of the District Attorney and the unfairness of the District Court combined to prevent petitioner from having a fair trial, and the recommendation of the death penalty by the jury is directly attributable to such conduct. A conviction based on such prejudicial misconduct should not be allowed to stand.

II.

Petitioner Was Convicted Upon a Charge Not Contained in the Indictment and Not Within the Purview of the Statute Under Which Indicted, and His Conviction and Sentence Denied Him Due Process of Law. Even Though the Jury's Verdict May Not Be Impeached, There Is a Remedy When It Is Plain that the Verdict Was Improper. And It Was Prejudicial Error to Admit Evidence of Petitioner's Offenses and That He Had Attempted to Smear Women.

The District Court stated he believed that the jury would never have recommended the death penalty except for the effect which they gave to the claim of petitioner that he had known Mrs. Stoll intimately in the year 1931—three years before the commission of the alleged offense—and that it doubted, even if the jury had made such a recommendation, the Court would have considered it, except for such testimony which the Court and jury accepted as untrue. (R. 1547) Petitioner was not indicted for perjury, nor for his claimed intimacy with Mrs. Stoll. He was supposed to have been tried of the offense of transporting Mrs. Stoll in interstate commerce after she had been kidnaped. In view of the District Court's statement as to why the jury recommended the death penalty, there is left no room for argument as to what reason or influence caused them to

recommend the death penalty. The question then is: Must the courts stand idly by and allow a conviction to stand that is based upon a charge or reason not made in the indictment nor contained in the statute, simply because there perhaps is a rule against impeaching verdicts of juries by the affidavits of jurors, as the Sixth Circuit contends? Or, is there some relief to petitioner from this precarious situation? The general rule is that a conviction upon a charge not made amounts to a denial of due process of law and cannot stand. That statement would seem to warrant the taking of unusual action, if need be, to extricate petitioner from the dilemma of standing convicted for what she said of and about the victim of an alleged kidnaping, without regard to whether or not a jury verdict may be impeached. It is said that if the nature of the extraneous influence before the jury is such that it would be prejudicial if acted upon, the aggrieved party is not required to disclose by affidavits or testimony that the jurors actually considered it, and where it is believed that such extraneous influences may have affected the jurors while engaged in deciding whether to convict, and in this case whether not only to convict, but whether to recommend the death penalty, the courts are solemnly required to act by sustaining a motion for new trial, motion in arrest of judgment or setting aside the verdict. Otherwise irreparable damage would be done those accused of crime. In the case of petitioner, if such a verdict were to be allowed to go uncorrected there would be the unwarranted and illegal forfeiture of petitioner's life.

In U. S. v. Dressler, 7th Cir., 112 F. 2d 972, a kidnaping case in which the death penalty was inflicted, the jury was permitted to take into the jury room Dressler's fingerprint card, on the back of which was his criminal history. The

verdict of guilty was followed by a jury recommendation that the death sentence be imposed. Dressler took the stand and virtually admitted his guilt, admitting many facts which made it unnecessary to otherwise prove, so there was little or no question about his being guilty of the offense with which charged. He admitted the kidnaping and the killing of his victim. From the fact that the jury were permitted to have the fingerprint card in the jury room, on the back of which was Dressler's criminal history, it could not be ascertained whether the jury convicted him and recommended the extreme penalty of death for the offense for which he was tried, or whether the jury was influenced, after they decided to convict him, to recommend that he be put to death because of his previous criminal record. In that case the Government contended that the jury verdict could not be impeached, and that only where it could be shown that there was an abuse of discretion in denying a motion for a new trial could the verdict of guilty and sentence imposed be set aside. However, because the Court believed, or that there was room for belief—though not sure one way or the other—that the extraneous influence of Dressler's criminal history may have caused the jury not only to convict but to ask that death be imposed, it very readily, and very properly, set aside the conviction and sentence. The ends justified the means. Just as in this case, whatever action this Court deems fit or proper to correct the wrongful conviction and sentence of petitioner would be justified.

The Dressler case is directly in point. Quotations from that case follow:

> "If the nature of extraneous information or *influence* which is introduced into the presence of the jury is such that it would be prejudicial if acted upon, *the*

aggrieved party is not required to disclose by the affidavits or testimony that the jurors actually considered it. If the only question before the jury had been that of guilt or innocence, we believe that the defendant's confession and his own testimony on the witness stand were sufficient to render harmless the consideration of the information furnished by the 'criminal history' * * *.

"But different considerations are involved in appraising the effect of the 'criminal history' upon the minds of the jurors while they were engaged in deciding whether the death penalty should be recorded. The decision of that question called for an exercise of discretion and an evaluation of any mitigating circumstances. * * * Under the law the jury was permitted to consider only the evidence relating to the crime with which defendant was charged. But in addition to such permissible evidence, the jury had before it, without limitation of its use, information which strongly indicated that the defendant was a hardened habitual criminal.

"If the 'criminal history' made any impression whatever upon the jurors, such impression must have been unfavorable to defendant's cause. And the *probability* that such information did substantially influence the jury is increased by the fact that the jury must have assumed that it was perfectly proper for it to give weight to the 'criminal history' of the defendant in deciding whether to recommend the death penalty.

"We do not find anything in the record which reasonably can be said to mitigate any prejudicial effect which might have been occasioned by the jury's consideration of the 'criminal history.'

"The defendant, both in his confession and in his testimony before the jury described several offenses committed by him during the course of his flight from prison and up to the time of the death of Hamilton, but the fact that there is before a jury legitimate evidence of the commission of offenses by the defendant other

than the one for which he is on trial ordinarily would increase the chance of prejudice to the cause of the defendant from permitting illegitimate evidence of still other crimes to go to the jury. *Furthermore, reviewing courts frequently have emphasized the duty of trial courts to exercise special caution to keep from the minds of jurors extraneous influences during the trial of a defendant who is charged with a crime that is particularly shocking.*"

Also this:

"The Government urges that this Court must assume that there was no prejudice since the defendant makes no affirmative showing that the jury was influenced adversely to defendant's cause. * * * In Little v. United States the following statement of the court makes the governing rule clear: '* * * where error occurs *which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.* * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.' * * * Defendant makes a showing of prejudice to his substantial rights when he shows to this Court that the 'criminal history' of the defendant was sent to the jury room for consideration by the jury."

Also:

"The generally accepted rule that a denial of a motion for a new trial is not assignable as error on appeal has been qualified by the statement, and holding, that the ruling will not be disturbed unless it appears that there was no abuse of discretion. This Court approved such limitations in U. S. v. Porter; and in Starr v. Superheater Co. held that the verdict should have been set aside and that there was an abuse of discretion in not granting a motion for a new trial in that case. We think such limitation is recognized

by the Supreme Court in Fairmont Glass Works v. Cub Fork Coal Co, 287 U. S. 474, 53 S. Ct. 252."

Also:

"On the basis of the record before us, it is impossible to say that the jury was not substantially influenced by the information which was improperly before it in arriving at its conclusion to recommend the death penalty. We conclude that the District Court should have set aside the verdict and granted a new trial."

That case is absolutely on all fours with the situation in this petitioner's case, for it very appropriately discloses that the aggrieved party is not required to disclose by affidavits that jurors considered the extraneous matter; that if such extraneous matter made any impression it must have been unfavorable to defendant's cause; that the *probability* that it influenced the jury is borne out by the result of their verdict; that it is the duty of trial courts to be especially cautious to keep from the minds of jurors such influences during the trial of a defendant charged with a shocking crime; that where error occurs which may, within the range of possibility, have affected the verdict of a jury, appellant is not required to explore the minds of jurors to prove that it did in fact influence their verdict; that when it is impossible to say that the jury was not substantially influenced by such improper matter in arriving at its conclusion to recommend the death penalty, it was an abuse of the trial court's discretion to refuse to grant a new trial. The above propositions were *negatively* stated, such as "when it is impossible to say the jury was not substantially influenced," etc.

In the case of petitioner it affirmatively appears from the statement of the trial court itself that the jury recom-

mended the death penalty because of an extraneous influence. It was not necessary for petitioner to show by affidavits or otherwise that such influence may have caused the jury to recommend the infliction of the death penalty. The trial court itself has supplied, by its statements hereinbefore referred to and quoted, that "reasonable possibility" which may have affected the verdict of the jury referred to in the Dressler case which makes it the duty of the trial court to set aside the verdict. Rather than exercising special caution to keep from the minds of the jurors in petitioner's case such extraneous influences as referred to in the Dressler case, the trial court exerted no effort whatsoever to keep them away, neither from the testimony nor from the objectionable argument of the district attorney. Petitioner makes a showing of prejudice by the trial court's own statement.

It is beyond a probability or possibility that in this case the jurors may have been influenced by such unwholesome influences. The trial court is on record as affirmatively stating it believed such extraneous influences caused them to recommend the death penalty. Petitioner submits that it was the solemn duty of the trial court to have taken such steps as were necessary to have prevented such unwarranted miscarriage of justice and denial to petitioner of due process of law. Petitioner's case most assuredly comes within the rule of *U. S.* v. *Atkinson,* 297 U. S. 157, 160, 56 S. Ct. 391, 392, that in exceptional circumstances, in criminal cases, Appellate Courts may, of their own motion, notice errors if such errors are obvious or otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Other Cases in Point.

In *Thornhill* v. *State of Alabama,* 310 U. S. 88, 60 S. Ct. 736, this Court said that the finding against the petitioner was a general one; that it did not specify the testimony upon which it rested; that it was unnecessary to go behind the statutes or the complaint to determine whether the evidence could ever support a conviction founded upon different and more precise charges, adding that "conviction upon a charge not made would be sheer denial of due process."

Of like effect is *Stromberg* v. *California,* 283 U. S. 359; 51 S. Ct. 532.

In *Williams* v. *State of North Carolina,* 317 U. S. 267, 63 S. Ct. 207, this was said:

> "* * * if one of the grounds for conviction is invalid * * * judgment cannot be sustained."

Other Offenses and the Smearing of Women.

Petitioner submits that the trial court erred, over objection, to which exception was taken, in admitting evidence of prior crimes by petitioner for which he was indicted, or, if not indicted with which he was alleged to have committed; and erred in allowing petitioner to be interrogated on the subject of his having smeared, or threatened to smear, other women in the State of Tennessee and his home city of Nashville. Petitioner contends that he was entitled to be tried upon competent evidence and only for the offense with which charged, and that his cross-examination should have been restricted to matters brought out on direct examination pertaining to the offense charged in the indictment. The Dressler case, already

cited, is excellent authority on this subject. The grandfather of authority seems to be that of *Boyd* v. *U. S.*, 12 S. Ct. 292, 35 L. Ed. 1077, which has this to say:

> "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

Upon the propriety of improper cross-examination, the case of *Harold* v. *Territory of Oklahoma,* 169 Fed. 47, is authority for the rule that when a defendant testifies he waives the privilege of silence and subjects himself to cross-examination and impeachment to the same extent as any other witness, but no farther, and that he may not be cross-examined upon other subjects and that it may not be developed on cross-examination what could not properly have been introduced by the prosecution in the presentation of its case.

It was plain error to allow the Government to get into evidence by the cross-examination of petitioner the facts that he had been charged with, though not convicted of, other offenses and that petitioner had threatened to smear other women if they dared to appear against him to prosecute some of the prior offenses with which petitioner had been charged. It may be added by way of explanation that the Government failed to produce or introduce one single one of the women whom it was claimed he threatened to smear.

III.

Involuntary Admissions Improperly Admitted.

While petitioner was undergoing cross-examination at the hands of the district attorney, he was asked whether he had written two letters under date of July 1, 1936, at a time when he was in the Federal Penitentiary at Leavenworth, Kansas, one of which was addressed to F. B. I. Agent Smith and the other addressed to Mr. Bates, the Director of Federal Prisons. Petitioner's counsel made strenuous objection to the introduction of such letters, in the nature of admissions and confessions, upon the grounds, and petitioner so testified, that they were involuntary because petitioner had been induced to write them under the hope, promise, inducement and persuasion of the prison warden that if he would write them petitioner would be taken out of isolation in the penitentiary and permitted the regular run of the penitentiary, and that so long as petitioner claimed to be insane he would be ineligible for parole. The further point was made by petitioner's counsel that the question of their voluntariness should be determined by the Court out of the hearing and presence of the jury. The trial court overruled objections and admitted them in evidence. (R. 955-960)

Not one, single word of testimony was introduced by the Government to refute petitioner's assertion that he was thus induced to write them and that they were wholly involuntary. Nevertheless, the Sixth Circuit in its opinion affirming held that they were written without the slightest duress or constraint and were wholly voluntary. How it could so decide without any testimony contradictory to that of appellant is not shown.

At the time petitioner wrote those letters he was on the service of a life sentence which had just recently been illgally imposed upon him (50 F. Supp. 774) for the same offense for which he now stands convicted. He was then in the Federal Penitentiary at Leavenworth. He was a stranger in strange surroundings. He was in prison isolation, segregated from the rest of the prisoners. He had been twice adjudicated insane, and had not been restored. He was still presumptively insane, and incapable of making a rational or voluntary admission. He says he was induced to write Prison Director Bates and to claim that he was not insane and that his previous insanity adjudications were the result of his father imposing upon his friends to avoid prosecution for some offenses against the State of Tennessee. It is rather remarkable, even absurd, that by having petitioner write that he was not insane and had never been insane the Government's own agent, the warden at Leavenworth, intended by this process to substitute and undo the force and effect of the expert opinions of the Tennessee psychiatrists appointed by the courts to examine him and the force and effect of the verdict of two Tennessee juries impaneled to try the issue of petitioner's insanity, and which had unanimously declared petitioner to be wholly insane.

Petitioner, serving an illegally imposed life sentence, then insane, having no advice of counsel, and being confronted with the choice of having to remain during the course of his life sentence in isolation, and remaining ineligible for parole so long as he claimed insanity, or given the alternate of asserting, under promise and hope, that he was not insane and had never been, did as the government agent commanded and wrote that he was not insane and had never been.

Insanity is a defense under the general plea of not guilty. It is every bit as much a defense as not guilty. The result of being compelled to admit, under duress and inducement, a disavowal of insanity is the same as being compelled to admit guilt under like duress or inducement.

The facts surrounding the manner in which petitioner's involuntary admissions were procured and the manner in which they were gotten into the evidence, calls for the application of the doctrine right recently laid down in *Feldman* v. *U. S.*, 64 S. Ct. 1082, decided May 29, 1944, to the effect that when a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States, and evidence thus procured is inadmissible and vitiates a conviction.

And right here is a most excellent opportunity to further apply the principles laid down in *McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608, that a conviction resting on evidence secured through flagrant disregard of the rights of accused persons, and who have been held incommunicado without advice of friends or counsel cannot be allowed to stand, and that it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, away from the jury, to determine whether such a motion should be granted or denied. The case of *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524, and many others, is of like effect.

The case of *Ashcraft* v. *Tennessee*, 64 S. Ct. 921, is of like effect, and specifically holds that the Supreme Court adheres to its opinion in the McNabb case.

Toosisgah v. *United States* (10th Cir.), 137 F. 2d 713, is authority for the rule that where it appears that evidence in the form of a confession has been obtained

illegally, it becomes the duty of the trial court to entertain a motion to exclude it and to conduct a hearing out of the presence of jurors; further stating that if the Court elects to determine the admissibility of such evidence in the presence of the jury, it does so at the risk of committing reversible error.

Harrold v. *Territory of Oklahoma,* 169 Fed. 47, 51, is leading authority for the rule that an accused person may not be impeached or contradicted by *incompetent* proof of contradictory statements, nor by proof of incompetent contradictory statements, and furthermore that one accused of crime may not be compelled to be a witness against himself concerning matters which are incompetent or not properly in issue or the subject of cross-examination.

In *Tuttle* v. *People,* 79 P. 1035, it appeared that Tuttle's statement did not amount to a confession or admission of guilt, but related principally to his whereabouts at the time the homicide was committed. It was said in that case that the constitutional provision was not intended to merely protect a party from being compelled to make confessions of guilt, but protects him from being compelled to furnish *a single link* in a chain of evidence by which conviction of a criminal offense might be secured.

In *People* v. *Shroyer,* 168 N. E. 336, 336 Ill. 324, it appeared that Shroyer had been adjudicated insane. The tendered offer of testimony of three witnesses to an alleged confession made in their presence was held inadmissible because made at a time when the presumption of insanity prevailed. After quoting State v. Campbell, 257 S. W. 131, 133, it held that one presumptively insane is not presumed to be capable of knowing his constitutional right and the confession or admission of such a person is an absolute nullity.

It is important to remember that when petitioner wrote the complained of admissions he was presumptively insane and being illegally detained upon an unlawful sentence. He was as much entitled to advice of counsel when he made those admissions as if he had just been apprehended and been awaiting to be arraigned upon the charge against him. From a legal and constitutional standpoint, at least, the situation is identical.

If at the time petitioner had the legal capacity, considering his prior adjudications of insanity, to make a *voluntary* disclaimer of insanity it would have amounted to a voluntary acknowledgment of capacity to commit the offense with which charged. Under those circumstances that would be tantamount to a voluntary admission that he had no defense to make based on insanity.

As heretofore pointed out, insanity is as much a defense as a plea of not guilty.

Insanity was interposed at the trial as one of petitioner's main defenses. If, therefore, petitioner was induced to make an involuntary admission that he had capacity to commit the offense with which he had been charged, the situation is no different than if he had been induced to make an involuntary admission of guilt, because insanity and a plea of not guilty stand on equal footings as defenses to crimes charged. The net result, therefore, is that the involuntary admission of capacity to commit the offense obtained by inducement, while petitioner was in custody and without counsel, introduced by way of cross-examination, impeachment of petitioner without having the issue of its voluntariness determined out of the presence and hearing of the jury amounted to a denial to petitioner of due process of law, and calls for the further application of the rule in the McNabb case and for the application of

the rule laid down in the case of *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, that one charged with crime and denied the aid of counsel may be put on trial without a proper charge and convicted upon incompetent or otherwise inadmissible evidence. "HE REQUIRES THE GUIDING HAND OF COUNSEL AT EVERY STEP IN THE PROCEEDINGS AGAINST HIM."

Courts take judicial knowledge of decisions of other Federal Courts and take judicial knowledge of the records and proceedings of their own particular courts. The District Court should have taken judicial knowledge that petitioner had been released on *habeas corpus* by the District Circuit at San Francisco because he had no counsel and because he had been previously adjudicated insane and could not enter a valid plea, *Robinson* v. *Johnston*, 50 F. Supp. 774. Those same inhibitions preventing his entering a valid plea would vitiate an involuntary admission made within about a month and a half from the time the invalid plea was accepted from petitioner in the same District Court in which he later was given the death sentence. The District Court therefore had ample knowledge of petitioner's incapacity to make admissions, which coupled with their involuntariness, made them wholly inadmissible for any purpose whatsoever.

For the reasons above advanced, petitioner unquestionably has been denied due process of law.

IV.

The Lindbergh Act Is Unconstitutional.

It is the contention that the statute aforesaid (Section 408a, Title 18, U. S. C. A.), known as the Lindbergh Act, is unconstitutional. The statute, as amended, is made a part of this argument by reference. It denounces as a crime the knowingly *transportation* in interstate commerce of any person who shall have been unlawfully seized, kidnaped, etc., and held for ransom or reward and provides that upon conviction the punishment shall be by death, if the verdict of the jury shall so recommend. The statute contains this further restrictive, qualifying provision and condition:

> "* * * provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed."

The original Act was passed on June 22, 1932. It was amended in 1934.

The Fifth Amendment to the Constitution guarantees that no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property, without due process of law; and the Sixth Amendment is a guarantee that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.

In *Marbury* v. *Madison,* 1 Cranch, 137, 2 L. Ed. 60, it was said that a law that is repugnant to the Constitution is void.

It is the rule also that extraordinary conditions do not create or enlarge constitutional powers, and that the opin-

ions of lawmakers and courts that a statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry of whether or not a law is constitutional. See Schechter Poultry Corporation v. U. S., 295 U. S. 495, 55 S. Ct. 837; and Carter v. Carter Coal Company, 298 U. S. 238, 56 S. Ct. 855.

The statute in question is a new one, which creates a new offense. It is petitioner's contention that the aforesaid language of the "unharmed" proviso invalidates the statute of which it is a part.

The death penalty may not be imposed unless the jury recommend it. From what is known of the background of the Act, Congress intended, as an inducement to kidnapers, that they should not be put to death unless they, themselves, killed the victim or inflicted upon the victim permanent injuries. In offering as an inducement to kidnapers freedom from the death penalty, Congress resorted to the use of an awkward, clumsy, and unascertainable expression in an attempt to convey its meaning by adding the proviso that the sentence of death shall not be imposed by the Court if, prior to its imposition, the kidnaped person has been liberated *unharmed.* The words "liberated unharmed" have a confused, unascertainable meaning. The harm, or freedom from harm, may relate to any time during the period of captivity; it may relate to the moment of release of the victim; and it may have been intended by Congress to relate to the time of the trial, in view of the language that the death penalty should not be imposed by the *Court* if, *"prior to its imposition,"* the kidnaped person has been liberated unharmed.

With at least three possible interpretations that could be placed on the words used by Congress, the question is:

How can it be determined with any degree of certainty just what Congress meant?

The term "unharmed," so far as known, has never been contained in any statute. It is a generic term. There is no criterion to follow in the construction or interpretation of the word. The statute which contains it is a new penal statute. Congress had use of the whole of the English language to define the term and to designate the time intended as to when the "harm" or freedom from harm should relate. It is significant that Congress devoted Section 408b of Title 18, U. S. C. A., to the definition of "interstate or foreign commerce," in spite of the fact that those terms have a generally understood and accepted meaning, but that it did not define the term "unharmed." Words and Phrases and law and other dictionaries do not contain a definition of the term. What might to one person and different courts mean "unharmed" or "harmed" might to other persons or to other courts have an entirely different meaning. There is no standard or guide fixed by the Legislature by which to ascertain the meaning of the word or the intention of the Legislature. It is impossible to ascertain whether Congress intended that a simple pin scratch upon the body would amount to "harm," or whether serious, painful and permanent injuries were intended. The statute is silent as to whether it meant bodily injuries, mental disturbance, fright, anxiety or other types of harm or injuries. Instances can be imagined when a kidnaped victim could undergo no infliction of bodily injuries and yet endure much mental anguish and fright and yet not be "harmed" in the sense of having had bodily injuries inflicted. The fact that confusion arises in the attempt to interpret what Congress meant makes the statute and the proviso repugnant to the Constitution.

If Congress intended to induce the kidnaper not to kill or maim the victim by withholding the infliction of the death penalty if the kidnaper refrained from so doing, that inducement would be wholly nullified by the imposition of the death penalty upon kidnapers who but slightly injured the victim. If such be the case, there would be no incentive for the kidnaper to refrain from killing, for he would be in no worse position if he killed than if he but slightly injured the victim. In fact, he would be worse off, for by failing to kill the victim the kidnaper would run the risk of being confronted in court by a live, talking victim. Congress assuredly did not intend for such victims to be killed.

In the case of petitioner, his alleged victim, Mrs. Stoll, was in court and testified for the Government as its chief prosecuting witness. Neither she nor any other witness uttered one word to indicate that she was then suffering from any injury or the result of any injury claimed to have been inflicted upon her by petitioner. Did the statute intend that petitioner should be sentenced to death in the absence of any showing that his alleged victim was permanently injured?

The time of the "harm" or freedom from harm and degree or extent of harm present questions of the intention of the Legislature.

It is the rule that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, and that terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, and that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application violates the first essential of due process of law. And the rule is also that such important elements cannot be left to conjecture, or be supplied by either the Court or the jury; that the crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue, and penal statutes prohibiting the doing of certain things and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward, clumsy expression, or language wanting in precision, to the intent of the Legislature. For the vice lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another. A law which licenses the jury to create its own standard in each case is repugnant to the Constitution. The exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all violates the due process of law clause.

In *Lanzetta* v. *State of New Jersey*, 306 U. S. 451, 59 S. Ct. 618, there was a conviction for violation of a statute making it a penal offense to be a gangster or member of a gang. That case was reversed because of the uncertainty of the term "gang."

The case of *Connally* v. *General Construction Company*, 269 U. S. 385, 46 S. Ct. 126, involved statutory provisions which contained no ascertainable standard of guilt, and the statute was held invalid.

In *United States* v. *Capital Traction Company*, 34 App. D. C. 592, a statute making it an offense for any street

railway company to run an insufficient number of cars to accommodate passengers "without crowding" was held to be void for uncertainty, because there was no guide for the Court or jury to ascertain what constituted a crowded car.

Stromberg v. *People of State of California,* 283 U. S. 359, 51 S. Ct. 532, is of like effect.

Herndon v. *Lowry,* 301 U. S. 242, 57 S. Ct. 732, involved an uncertain statute, and it was condemned as being repugnant to the Constitution.

The case of *United States* v. *L. Cohen Grocery Company,* 255 U. S. 81, 41 S. Ct. 298, involved a statute using the terms "unjust and unreasonable." It was held in that case that no reasonable standard of guilt was prescribed.

In *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 52 S. Ct. 559, the question for determination was whether the refinery had committed "waste" in violation of the statute. Although the statute defined the term, it was held to be indefinite and uncertain and therefore invalid.

Weeds, Incorporated, v. *United States,* 41 S. Ct. 306, involved the same terms as in the Cohen Grocery Company. A demurrer to the indictment was sustained because the statute was held to be repugnant.

Petitioner submits that the statute in question, known as the Lindbergh Act, falls squarely within the line of decisions in the cases herein referred to, and that it is unconstitutional because indefinite and because it prescribes no ascertainable standard of conduct by which to be governed.

The opinion of the Court below holds, however, that the proviso of the statute in question is the punishment provided for the commission of the offense denounced and that petitioner is not entitled to be advised of the punish-

ment that may be inflicted. That is unsound. The proviso is not a part of the punishment. It excepts something from the operative effect of the statute and qualifies and restrains the generality of the substantive enactment to which it is attached. It is a restriction upon the substantive enactment to which it is attached. Therefore, it is as much a part of the offense as any other portion of the statute denouncing the crime. It is so attached to the substantive enactment as to make it reasonably sure that the Legislature would not have enacted the other portions with the questioned portion omitted.

Therefore, if this statute in question, or any proviso is invalid, then the entire statute must be held inoperative. Such were the rulings in *Connolly* v. *Union Sewer Pipe Company,* 22 S. Ct. 431, 184 U. S. 540; *Butts* v. *Merchants and Miners Transportation Company,* 230 U. S. 126, 33 S. Ct. 964; *McFarland* v. *American Sugar Refining Company,* 36 S. Ct. 498, p. 501.

In the case of *Weems* v. *United States,* 30 S. Ct. 544, 555, it was contended by the Government that the provision relating to the punishment was separable from the accessory punishment. That contention was rejected, and the Court held that the statute was put into force with all its provisions dependent, and that they could not be declared to be separable.

Courts incline toward treating a penal statute as void in its entirety whenever one section or *clause* is clearly unconstitutional. Section 166, Const. Law, American Jurisprudence.

Petitioner submits that the proviso in question and the whole of the statute of which it is a part are invalid for repugnancy to the Constitution and that because petitioner was tried and convicted under an invalid statute he has been denied due process of law.

V.

The Indictment Under Which Petitioner Was Tried and Convicted is Demurrable Because It Fails to Allege Essential Particulars of the Offense: Because It is Duplicitous: Because It Contains Constructive Offenses: and Because It Attempts to Allege Facts in Aggravation of the Offense Without Particularizing.

The Second Count of the indictment[16] attempted to charge petitioner, somewhat in the language of the statute, with the unlawful transportation in interstate commerce of Mrs. Alice Stoll after she had been kidnaped and held for ransom, and that he did not liberate her unharmed. It has already been demonstrated in Point IV of this argument that the proviso containing the word "unharmed" is indefinite and ambiguous. The bare, naked assertion that petitioner failed to liberate the victim un-

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[16]SECOND COUNT.

And the Grand Jurors aforesaid upon their oaths aforesaid do further present:

That heretofore, to-wit, on or about the 10th day of October, in the year of our Lord 1934, in Jefferson County, Kentucky, in said district and within the jurisdiction of this Court, Thomas Henry Robinson, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., late of said district unlawfully did then and there knowingly transport and cause to be transported and aid and abet each other in transporting in interstate commerce, a person who had been unlawfully seized, kidnaped, abducted and carried away and held for ransom, and said person was not a minor and had not been seized and carried away by her parents, and did not liberate said person unharmed; that is to say, at said time and place the said Thomas Henry Robinson, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., unlawfully did then and there transport and cause to be transported and aid and abet each other in transporting in interstate commerce, to-wit, in commerce from Louisville, in the State of Kentucky to Indianapolis, in the State of Indiana, Mrs. Alice Stoll, not a minor and not transported by her parents, who had been unlawfully seized, kidnaped, abducted and carried away from her home by the said Thomas Henry Robinson, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., and held the said Mrs. Alice Stoll for ransom or reward, and the said Thomas Henry Robnison, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., did then and there, while the said Mrs. Alice Stoll was in their custody, beat, injure, bruise and harm and aided and abetted each other in beating, injuring, bruising and harming the said Mrs. Alice Stoll, and did not liberate her unharmed.

harmed is wholly insufficient. The Sixth Amendment guarantees that the accused shall enjoy the right to be informed of the nature and cause of the accusation. An omission to charge with particularity matters of substance is not aided or cured by the verdict. Petitioner, under the Sixth Amendment, was entitled to be furnished with the particularized facts in the indictment so as to apprise him of the nature and cause of the accusation, and to enable him to prepare a proper defense.

Petitioner was entitled to have set forth in the indictment all the necessary ingredients of the offense. The omission of any fact or circumstance necessary to constitute the offense is fatal.

The indictment in question wholly failed to set forth any facts or circumstances from which petitioner would know or be apprised what constituted a "release unharmed" of the victim. The words of the statute were insufficient in and of themselves to give that information. The indictment failed to specify the details of the alleged failure to release unharmed.

Petitioner interposed a demurrer to the indictment (R. 33), asserting that it did not contain sufficient allegations to charge him with the commission of an offense; that it was indefinite, and that it was duplicitous because containing more than one offense in the second count.

The allegation in the indictment that petitioner did not release unharmed the victim amounts to nothing more than a conclusion of the pleader, thus making the indictment defective. Under the language of that allegation petitioner would have no way of knowing what proof on that question he would be required to meet. Therefore, he could not properly prepare a defense. The indictment wholly fails to specify the nature, degree, or extent of the freedom

from harm alleged. The case of *United States* v. *Carll*, 105 U. S. 611; 26 L. Ed. 1135, well illustrates the point. This was said:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

Without the accompaniment of words descriptive of the harmed condition, or freedom from harm, it was merely a conclusion to charge that she was not released unharmed.

A case further illustrative of the point made is that of *Commonwealth* v. *White* (Ky.), 109 S. W. 324, 33 Ky. L. R. 70. The indictment in that case was drawn in the exact language of the statute denouncing as an offense the assaulting of another with a deadly weapon. The indictment was held defective because it failed to describe the instrument claimed to be a deadly weapon, the opinion adding that it might have been a dirk, a sword or a heavy, murderous bludgeon, and stating further that the prosecution could not show in evidence that the deadly weapon was a 45-caliber pistol. It added that such an instrument is a deadly weapon, but that the defendant should have been informed of the fact that the Commonwealth would attempt to prove that defendant used such a weapon.

Harris v. *United States*, 104 F. 2d 41, referred with with approval to the Carll case and to the case of *United*

States v. *Hess,* 8 S. Ct. 571. The Harris case is authority for the rule that, while the strict requirements and formalities of criminal pleading under the common-law rules have been modified by modern practice, this does not mean that matters of *substance* may be omitted from the allegations of an indictment.

United States v. *Cruikshank,* 92 U. S. 542, 23 L. Ed. 588, holds that any omission to set out in an indictment all necessary ingredients cannot be supplied by intendment or implication, and that the charge must be made directly and not inferentially by way of recital.

Of like effect is *Foster* v. *United States,* 253 Fed. 481, which adds that:

> "A bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in its discretion * * * It does not constitute a part of the record, and it is not subject to demurrer. Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot 'give life to what was dead when it left the grand jury' (citing cases)."

Petitioner submits that the indictment in this case falls far short of the requirements; that it is demurrable, and that his prosecution under it amounted to a denial to him of due process of law.

Facts in Aggravation.

There is another reason why the demurrer to the indictment should have been sustained. By incorporating in the indictment words to the effect that the victim was not released unharmed, there was an attempt to aggravate the offense attempted to be charged and the punishment upon

conviction could be increased from a maximum of life imprisonment to one of death. It is the rule of indictment pleading that when the indictment attempts to charge an offense, the punishment upon conviction for which may be aggravated, the facts constituting such aggravation of the crime as will increase the statutory punishment *must* be plainly charged or they are not confessed by a plea or established by a verdict of guilty.

Petitioner, under the due process clause, was entitled to have alleged in the indictment such particularized facts as would increase the statutory punishment. The indictment in this case is completely devoid of such essential, enumerated facts as would increase the punishment up to a maximum of death.

Mr. Bishop, on Criminal Law, 1 Bishop's Cr. Law, Section 601, says that:

> "* * * to punish one for all of a crime where only a part of it is charged is to punish him without accusation."

That quotation is contained in the case of *Aderhold* v. *Pace*, 65 F. 2d 790, which had for consideration the conviction under an indictment which charged unlawful selling of liquor but without alleging the quantity sold. There were different punishments provided by the statute, depending upon the quantity of liquor sold. Upon a writ of *habeas corpus*, the Court held that the sentence in excess of that prescribed for the lesser offense was void because the indictment did not specify the amount sold.

In *Meyers* v. *United States*, 116 F. 2d 601, Meyers pleaded guilty to an indictment charging an offense of attempted robbery of a bank and was sentenced and sent to Alcatraz Prison. Later it was contended by him that the

indictment did not set forth the aggravated offense. From an adverse decision he appealed, and the Circuit Court, after pointing out that the indictment failed to include any charge of the aggravated offense, said:

> "The facts constituting such aggravation of a crime as will increase the statutory punishment must be plainly charged or they are not confessed by a plea or established by a verdict of guilty."

See *Goodman* v. *State* (Texas), 172 S. W. 2d 94, wherein, in speaking of the insufficiency of the indictment, it was said:

> "The conclusion is here reached that the information fails to allege the constituent elements necessary to constitute the offense of aggravated assault, and that the judgment of the trial court should be reversed, and the prosecution dismissed."

Applying those rules to the instant indictment, it is readily observable that this indictment miserably fails to set forth any particularized facts whatsoever by which petitioner could be apprised of what the prosecution intended to prove by way of aggravation of the offense charged. The generic term of "unharmed," or charge "and did not release her unharmed" are wholly inadequate and insufficient to admit of increasing the punishment to death. Those terms failed to tell petitioner what facts in aggravation of the offense he would be called upon to meet. He could not possibly prepare a defense thereto. This is but one more instance of denial to him of due process of law.

Duplicity.

Duplicity consists in charging more than one offense in the same count of an indictment. One of the tests for determining duplicity is whether different punishments are provided for the offenses. Punishment up to life imprisonment is provided for the offense of transporting a kidnaped person in interstate commerce. The death penalty is provided, the jury recommending, for failing to release unharmed the kidnaped person. The opinion of the court below holds that "Appellant might have been convicted without any showing that Mrs. Stoll was liberated at all"; from which it is obvious that the punishment provided for merely transporting a kidnaped person is different from failing to release unharmed the kidnaped person. The transaction of transporting a kidnaped person is in no sense continuous with the failure to release unharmed the kidnaped victim. In the instant case it was alleged that petitioner transported the victim on October 10, 1934, from Louisville to Indianapolis. The time of the release of the victim is not alleged. The proof however established that date to be October 16, 1934. The point is, that the alleged transportation and the failure to release unharmed was broken by an interval of some six or seven days. The two offenses may not be said to be continuous. Yet, even if they were, they are distinct offenses for which different punishments are provided, and the indictment is duplicitous in charging in the same count the two distinct offenses.

In *Blockburger* v. *United States*, 234 U. S. 299, 52 S. Ct., the indictment contained five counts and charged a sale in each count of morphine to the same purchaser. The

contention was made that, upon the facts, the two sales charged in the second and third counts as having been made to the same person constituted a single offense. The Court rejected that contention by holding that the sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times.

In *Schultz* v. *Zerbst*, 73 F. 2d 668 (10th Circuit), it was said that the test to be applied to determine whether there are two offenses, is whether each requires proof of a fact which the other does not, citing the Blockburger case. In the simple offense of transporting a kidnaped person in interstate commerce, it would not require any proof of the fact that the kidnaper failed to release the victim unharmed. So, the application of the test demonstrates that there were two distinct offenses alleged in Count Two of the indictment.

In *Creel* v. *United States*, 21 F. 2d 690 (8th Circuit), the indictment charged defendant with *selling* and *furnishing* a quantity of intoxicating liquor. The opinion recites that the allegations did not set forth different modes of committing the same offense, but set forth the commission of two different offenses, saying that of course it was possible to furnish without selling, and *vice versa*. The Court held that there was a joinder of distinct offenses in each count of the indictment and that the demurrer thereto should have been sustained.

In *Albrecht* v. *United States*, 273 U. S. 1, 47 S. Ct. 250, it was contended that there was a double punishment because the liquor which the defendants were convicted for having sold was the same that they were convicted for having possessed. But the opinion pointed out that possessing and selling are distinct offenses, and that the fact

that the person sells the liquor which he possessed does not render the possession and the sale a single offense, adding that there was nothing in the Constitution preventing Congress from punishing separately each step leading to the consummation of a transaction and punishing also the completed transaction, which but emphasizes the contention of petitioner that transportation of the kidnaped victim was separate from the failure to release unharmed the kidnaped victim.

Of like effect is *U. S.* v. *Hopkins,* 290 F. 619, in which case the first count of the indictment alleged that the defendant did "unlawfully * * * take, steal, carry away and conceal and did aid, assist, and abet in taking, stealing, carrying away and concealing," the particular property mentioned in the indictment. The court held that the first count attempted to charge all four of those offenses and to add to them another offense of aiding, assisting and abetting in each of the four, and that the demurrer thereto should have been sustained.

Petitioner vigorously insists that the indictment in this case is bad because of duplicity and that his demurrer thereto should have been sustained.

Indictment Contains Constructive Offense.

There is another reason why the demurrer to the indictment should have been sustained. The gists of the offenses in the aforesaid statute are the transportation in interstate commerce of a kidnaped person and the failure to release unharmed the kidnaped person. The indictment in the instant case charges a constructive offense of assault and battery in these words:

"and the said Thomas Henry Robinson, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., did then and there, while the said Mrs. Alice Stoll was in their custody, beat, injure, bruise and harm and aided and abetted each other in beating, injuring, bruising and harming the said Mrs. Alice Stoll, and did not liberate her unharmed,"

The Lindbergh Act denounces no offense of that character. It is plain that such allegations do not constitute an element or ingredient of the offenses denounced in Section 408a, Title 18, U. S. C. A. It is equally apparent that the indictment containing such language is fatally defective because containing a constructive offense.

In *Fasulo* v. *United States*, 272 U. S. 620, 47 S. Ct. 200, Fasulo was indicted, with others, and convicted of a conspiracy to violate the law denouncing the fraudulent obtention of money by use of the mails. The question was whether the use of the mails for obtaining money by means of threats of murder or bodily harm was within the purview of the statute. The Government contended that all dishonest methods of deprivation by the use of the mails was embraced within the statute. That contention was rejected:

> "The words of the Act suggests no intention to include the obtaining of money by threats. There are no constructive offenses; and before one can be punished, it must be shown his case is plainly within the statute."

Of like effect is *United States* v. *Resnick*, 299 U. S. 207, 57 S. Ct. 126, which said:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."

United States v. *Chase,* 135 U. S. 255, 10 S. Ct. 756. The question was whether an act declaring every book, paper, writing, etc., to be unmailable embraced an obscene *letter.* This was said:

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally of susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

See, also, *United States* v. *Wiltberger,* 5 Wheat. 76, 95, 5 L. Ed. 37. Likewise, *Karem* v. *United States,* 121 Fed. 250 (C. C. A. 6th).

In *State* v. *Mattison,* 100 N. W. 1091, it was revealed that the information purported to charge the crime denounced of shooting with intent to kill, but when framed included also the crime of maiming, on the theory that inasmuch as the crime of maiming resulted from the commission of the shooting, the former could be included in the charge. That opinion said that maiming may, and often does, result from shooting, but that it was a distinct offense, and under no circumstance forming part of the consummated crime of shooting with intent to kill.

It is very clear from the above authorities that the constructive offense of beating, injuring, bruising, etc., contained in the indictment made it invalid, and the demurrer should have been sustained.

Indictment Insufficient as to Time and Place.

The indictment charges that on or about the 10th day of October, 1934, in Jefferson County, Kentucky, in said district, and within the jurisdiction of the Court, the petitioner, with his wife and father did transport Mrs. Stoll in interstate commerce from Louisville to Indianapolis, who had been unlawfully kidnaped and carried away from her home by petitioner, his wife and father. The indictment does *not* allege that she was transported from her *home in Louisville,* nor does it specify the location of her home. It merely alleges that her transportation in interstate commerce occurred after she had been carried from her home, without alleging where her home was located. For aught that appears, her home might have been located on any of the many streets of Louisville, a city well over 350,000 in population, or her home might have been located at any point within the still larger county of Jefferson. The proof later developed that her home actually was on a *farm* located on Lime Kiln Road out in the county, several miles outside the city of Louisville (R. 451-455. Government Exhibit No. 1).

But proof is wholly inadequate to supply deficiency in allegation.

Two Cases in Point.

In *Turk* v. *United States,* (8th Circuit) 20 F. 2d 129, it was charged in the indictment that:

> "* * * 'on or about the 25th day of May, 1924, in Oklahoma county in the Western district of the state of Oklahoma and within the jurisdiction of this court, Henry Turk, * * * did then and there knowingly,

willfully and unlawfully have in his possession and under his control intoxicating liquors, to wit, beer,' and in the second count of the information that * * * on or about the 25th day of May, 1924, in Oklahoma county, in the Western District of the state of Oklahoma * * * Henry Turk * * * did then and there knowingly, willfully and unlawfully sell and deliver to Roy Rambo intoxicating liquors, to wit, beer.

"The averment that each of the offenses was committed on the 25th day of May, 1924, gave the defendant no notice of the *time* of its alleged commission for that averment permitted the government to prove each of these offenses at any time within three years prior to the filing of the information. The allegation of *place* was ineffectual because it permitted the government to prove either offenses at *any place* in the Western district of Oklahoma within the jurisdiction of the court. The information contained nothing from which the defendant, who was presumed to be innocent, could derive any notice or knowledge when and where within the jurisdiction of the court or under what circumstances the government intended to try to prove either of these alleged offenses against him. * * * It confines the possible proof of the commission of each of the offenses to no *time* within three years, to no *place* within the jurisdiction of the court, to no identifying circumstances, and a judgment upon it would not protect the defendant against a second prosecution for the commission of the same offense at any *time* within the three years and at any *place* within the jurisdiction of the Court."

The case of *Parton* v. *United States* (8th Circuit), 20 F. 2d 127, is of the same effect.

VI.

Petitioner Was Entitled to Directed Verdict.. And in no Event Was It Proper to Permit the Jury to Recommend, or for the Court to Inflict, the Death Penalty on Petitioner.

The gravamen of the offense denounced by the statute is the transportation in commerce of a kidnaped person. The proof in this case of beating and injuring the victim was confined to two witneses, Mrs. Stoll and her maid, Ann Woolet. They each testified that the beating and injuring of Mrs. Stoll occurred in the Stoll home *prior* to her transportation, and *prior* to her being taken in custody. The indictment charges that while in the *custody* of petitioner, his wife and father Mrs. Stoll was beaten and injured. The language of that part of the indictment is as follows:

> "* * * and the said Thomas Henry Robinson, Jr., Mrs. Frances Robinson and Thomas Henry Robinson, Sr., did then and there, *while the said Mrs. Alice Stoll was in their custody*, beat, injure, bruise and harm and aided and abetted each other in beating, injuring, bruising and harming the said Mrs. Alice Stoll, and did not liberate her unharmed."

Laying aside the argument heretofore made that such language charges a constructive offense not within the purview of the statute, the Government's proof wholly failed to establish that the beating and injuring occurred *after* Mrs. Stoll was in the custody of petitioner, his wife and father. Also, the indictment specifically charges that the beating and injuring of Mrs. Stoll occurred while she was in THEIR custody, *i. e.*, in the custody of all three

named in the indictment. It never was established by the Government that Mrs. Stoll was ever in the custody of the father of petitioner. The failure to prove that she was in the custody of all three named in the indictment is fatal to the Government's case. The further failure to establish, as charged in the indictment, that the beating and injuring occurred while she was in their custody—the custody of all three—*subsequent* to the kidnaping and transportation in commerce is undeniably a failure to prove, as is absolutely necessary, not one, not some, but each and every element of the offense alleged.

Furthermore, Mrs. Stoll was not asked, nor did she say, nor did any one else say, that the injuries claimed to have been in existence upon her release were injuries inflicted upon her by petitioner, or that her condition upon release was the result of prior injuries inflicted upon her by petitioner. This is another instance of the Government failing to prove an essential element of the offense.

Before petitioner could be convicted, it was absolutely necessary for the Government to adequately prove each and every essential element of the offense which is alleged in the indictment. See *McAfee* v. *United States*, 105 F. 2d 21.

The Court should have directed a verdict of not guilty for petitioner and dismissed the indictment. Its failure to do so was a substantial, reversible error.

VII.

The Alternate Juror Statute Unconstitutional. Disqualified Jurors Were Allowed to Serve. The Verdict Participated in by an Alternate Juror Denied Petitioner Due Process of Law.

By Section 417a of Title 28, U. S. C., provision is made for the selection of two alternate jurors when it appears that there might be a protracted trial. It was petitioner's constitutional right to a trial by a jury of twelve, as provided by the Sixth Amendment, and by Article II, Sec. 2, Cl. 3, of the Constitution. This question presents an important Federal question and one of public importance which has not, save for the opinion of the Sixth Circuit, been decided, but which should be decided. Petitioner had the constitutional right to a trial by a jury of twelve, no more and no less, and it would appear that this alternate juror statute is wholly unconstitutional and that by the application of its procedure in permitting alternate juror C. E. Miller to serve in the absence of Mrs. Davidson, the regular juror, who was excused because of illness (R. 1054), was a denial to petitioner of due process of law.

Five jurors should have been disqualified for cause from service upon the jury by reason of social, business, personal, professional and religious contacts with Mrs. Stoll and with members of the Stoll, Speed, and Sackett families. The record (pp. 245 to 315) fully establishes that relationship and the incompetency of the five challenged for cause, but which challenges were overruled. Petitioner exercised all of his peremptory challenges and used five of them in challenging those five jurors complained of. Selection of jurors in Federal Courts is gov-

erned by the law of the State in which the trial is held, thus the Kentucky law on the subject controls. In *Hess' Admr.* v. *L. & N. R. R. Co.*, 249 Ky. 624, 61 S. W. 2d 299, the case was reversed because one of them was administrator of an estate which held stock in the railroad company, a party to the action.

It was said in that case that the law owes to every man one fair trial, and that it can be had only at the hands of a jury whose members are wholly disinterested. Caesar demanded that his wife should not only be virtuous, but beyond suspicion. The law's demand for disinterested jurors affecting life and liberty is no less exacting. Petitioner was denied a fair trial and due process of law by being required to exercise five of his challenges on plainly disqualified jurors. The jury which was selected was biased and partial. The verdict and the trial court's remarks heretofore referred to bear out this assertion, and petitioner did not have a fair trial by an impartial jury.

VIII.

Petitioner Twice Put in Jeopardy for the Same Offense.

Petitioner was illegally sentenced in the District Court for the Western District of Kentucky on May 13, 1936, for the same offense for which he on December 11, 1943, was convicted and for which on December 13, 1943, he was sentenced. He was released on a writ of *habeas corpus* by Judge Roche of the California District Court. (See *Robinson* v. *Johnston*, 62 S. Ct. 1301; *Robinson* v. *Johnston*, 50 F. Supp. 774.) Petitioner has thus been twice put in jeopardy for the same offense, which is a denial to him of due process of law. Jeopardy attaches when a person has been placed on trial by the impaneling of a jury or, if the

trial is by the Court, when the trial has begun. Double jeopardy does not depend upon the result of the trial, but upon the fact of trial. And if a court proceeds illegally after a prisoner has been placed in jeopardy, its illegal act can not nullify the jeopardy. See *Ex Parte Lange*, 21 L. Ed. 872; Secs. 241, 243 and 245 of Corpus Juris Secundum, "Criminal Law"; and *People* v. *Warden of Nassau County Jail*, 199 N. E. 647.

CONCLUSION.

Upon the whole case it is submitted that petitioner has been denied due process of law, and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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